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Race Relations Law Reporter

A Complete, Impartial Presentation of Basic Materials, Including:

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
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RACE RELATIONS LAW REPORTER

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Tennessee

Recent Developments . . . A Summary

Education

Little Rock, *Arkansas,* school officials have been ordered, under a decree of the Eighth Circuit Court of Appeals, to refrain from transferring school properties to anyone for segregated school operations; these officials likewise were to be directed to take such affirmative steps as the district court might require to facilitate existing integration plans (p. 1135). The *Arkansas* Attorney General has issued an opinion with respect to the effect of a recent legislative act which concerns the withholding and distribution of state funds when schools are closed (p. 1251).

In *North Carolina,* a federal district court dismissed an action to desegregate Montgomery County schools on the ground that state administrative remedies had not been exhausted (p. 1144). The same court, in a suit against state and Caswell County school officials, dismissed the action against the former because, if successful against the local officials who have specific authority to assign pupils, Negro children would receive complete relief (p. 1146).

A federal district court in *Oklahoma* has directed Okmulgee County school officials to admit four Negro children to a "white" school and be prepared for general integration by the 1959-60 term. The court refused, however, to enjoin the Negro principal of the nearby all-Negro school from attempting to persuade Negroes to patronize his, rather than the "white" school. (p. 1151) In a case involving denial to a Negro boy of a transfer to a white high school in Morris, *Oklahoma,* this court held for defendant school officials, because statutory procedures for state court review had not been observed and because it did not feel obligated to supervise the administrative problem under the transfer laws created by the boy's transfer to another district in the meantime (p. 1154).

Dismissal by a federal district court of an action by a *New Jersey* teacher under the Civil Rights Act for failure to exhaust state administrative remedies has been affirmed by the Third Circuit Court of Appeals (p. 1162).

The Norfolk, *Virginia,* City Council adopted a resolution calling for a referendum on whether to petition the governor to return closed schools to city control for integration and reopening (p. 1239). (The vote was not to petition).

Elections

Mississippi literacy requirements for voting have been upheld by a federal district court in a case attacking them as unconstitutional on their face and in application. The court also held that state administrative remedies should have been exhausted, interpreting a Civil Rights Act provision granting federal jurisdiction regardless of whether one "shall have exhausted any administrative or other remedies that may be provided by law" as limited to proceedings instituted by the United States Attorney General for private individuals (p. 1177).

Employment

A district court decision holding that the Railway Labor Act does not prevent racial discrimination in admission practices of unions certified as bargaining representatives under the Act has been affirmed by the Sixth Circuit Court of Appeals (p. 1195).

Governmental Facilities

A suit in federal district court charging that officials concerned with a Eufaula, *Alabama,*

CORRECTION

In error, the words ". . . and authorizing the creation of separate classes for white and negro students in certain situations (p. 901)" appeared in the October, 1958, Summary of Recent Developments with respect to the Delaware school decision at page 901. This language should have described Arkansas Act No. 7 which appeared at page 1051 in the same issue.

urban renewal project had a "tacit understanding" with unidentified private enterprisers relative to future racial discrimination was dismissed for lack of a present genuine controversy appropriate for court determination (p. 1216).

Subsequent to a May, 1958, announcement by the Municipal Housing Commission of Louisville, *Kentucky,* that Negroes had moved into certain previously-white projects pursuant to federal court order, a number of legal developments involving tenants occurred (p. 1199).

Public Accommodations

The Director of the *Colorado* Anti-Discrimination Commission has expressed the opinion that student rooming and boarding houses are places of public accommodation and that the state university might be cited for violating a state anti-discrimination statute should it list, or refer students to, such houses which practice racial discrimination (p. 1249).

A tavern in Detroit, *Michigan,* has been enjoined by a state court from violating a statute guaranteeing all persons equal privileges in places of public accommodation, although the statute expressly provides as remedies only criminal penalties and treble civil damages (p. 1227).

Miscellaneous

The United States Supreme Court has reversed a district court holding that there was no actual controversy in a case involving a Negro told to move to the rear, get off, or be arrested, after boarding a Memphis, *Tennessee,* bus for the purpose of instituting a suit testing a state segregation statute (p. 1121).

A federal district court has held itself without authority to invalidate an *Alabama* Act redrawing Tuskegee boundaries with the alleged purpose and effect of excluding Negro voters (p. 1220). Another district court held that a suit under the Civil Rights Act alleging discriminatory denial of a Negro's right to take an examination for police patrolman in Birmingham, *Alabama,* was barred by a state general one-year statute of limitations (p. 1163). The *Arkansas* Supreme Court has enjoined the Secretary of State from certifying as sufficient a ballot title for a proposed "States Rights Amendment" to the state constitution (p. 1169). A special presentment dealing with Atlanta race relations has been issued by a Fulton County, *Georgia,* grand jury (p. 1231). A Negro prizefighter has successfully challenged in federal district court *Louisiana* statutory and administrative prohibition against "mixed" athletic contests (p. 1232).

Reference

"Inciting Litigation," the reference article in this issue, provides a background study for the recently enacted statutes dealing with champerty, maintenance, and barratry. The Canons of Professional Ethics which may be relevant to litigation activity in the race relations field are also discussed in this study (p. 1257).

For the convenience of readers who wish to bind their copies, a title page for Volume III follows page 1309 in this issue.

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Buses—Tennessee

O. Z. EVERS, et al. v. John T. DWYER, et al.

United States Supreme Court, December 15, 1958, No. 382, ... U.S. ....., 79 S.Ct. 178

SUMMARY: A Memphis, Tennessee, Negro, who left a city bus after being told to move to the rear, get off, or be arrested, brought a class suit in federal district court seeking a declaratory judgment and injunction restraining city officials and the local transit company from enforcing a state statute requiring segregation on buses. The three-judge court dismissed the action, finding that there was no actual controversy as required by the Declaratory Judgment Act since plaintiff had boarded the bus for the purpose of instituting a test suit; that he was not "representative of a class of colored citizens who do use the buses in Memphis as a means of transportation"; and that he had not suffered irreparable damage necessary to justify the issuance of an injunction. —— F.Supp. ——, 3 Race Rel. L. Rep. 743 (W.D. Tenn. 1958). On appeal, the United States Supreme Court reversed and remanded, holding that the district court had erred in not proceeding to the merits because the record disclosed an actual controversy. The court said that a resident of a city who cannot use its transportation facilities without being subjected to special statutory disabilities has a substantial, immediate, and real interest in the validity of such a statute. The court concluded, "That the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant."

PER CURIAM.

Appellant, a Negro resident of Memphis, Tennessee, brought this class action in the Western Division of the United States District Court for the Western District of Tennessee, seeking a declaration as to his claimed constitutional right, and that of others similarly situated, to travel on buses within that city without being subjected, as required by Tenn. Code Ann., Title 65, §§ 1704-1709 (1955), to segregated seating arrangements on account of race. An injunction against enforcement of this statute or any other method of state-enforced segregation on Memphis transportation facilities was also sought. Various officials and officers of the City of Memphis, the Memphis Street Railway Company, and one of that Company's employees were named as defendants. After a hearing a three-judge District Court, without reaching the merits, dismissed the complaint on the ground that no "actual controversy" within the intendment of the Declaratory Judgment Act, 28 U.S.C. § 2201, 28 U.S.C.A. § 2201, had been shown, in that appellant had ridden a bus in Memphis on only one occasion and had "boarded the bus for the purpose of instituting this litigation," and was thus not "representative of a class of colored citizens who do use the buses in Memphis as a means of transportation."

Of course, the federal courts will not grant declaratory relief in instances where the record does not disclose an "actual controversy." Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291. In Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826, this Court said: "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is

necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." In the present case we think that the record establishes the existence of an actual controversy which should have been adjudicated by the lower court.

The District Court found that when appellant boarded a Memphis bus on April 26, 1956, and seated himself at the front of the vehicle, the driver told him he must move to the rear, "stating that the law required it because of [his] color;" that following appellant's refusal to comply, two police officers shortly thereafter boarded the bus and "ordered [appellant] to go to the back of the bus, get off, or be arrested;" and that thereupon appellant left the bus. The record further shows that the appellees intend to enforce this state statute until its unconstitutionality has been finally adjudicated. We do not believe that appellant, in order to demonstrate the existence of an "actual controversy" over the validity of the statute here challenged, was bound to continue to ride the Memphis buses at the risk of arrest if he refused to seat himself in the space in such vehicles assigned to colored passengers. A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of the statute which imposes the disability. See Gayle v. Browder, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114, affirming the decision of a three-judge District Court reported at 142 F.Supp. 707. That the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant. See Young v. Higbee Co., 324 U.S. 204, 214, 65 S.Ct. 594, 599, 89 L.Ed. 890; Doremus v. Board of Education, 342 U.S. 429; 434-435, 72 S.Ct. 394, 397-398, 96 L.Ed. 475.

We hold that the court below erred in not proceeding to the merits. Accordingly, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Reversed and remanded.

INDIANS
Indian Lands—New York

TUSCARORA NATION OF INDIANS v. POWER AUTHORITY OF STATE OF NEW YORK, et al.

United States Supreme Court, September 8, 1958, 79 S.Ct. 4
United States Court of Appeals, Second Circuit, 257 F.2d 886.

SUMMARY: The Tuscarora Indian Nation, in April, 1958, brought an action in federal court in New York, seeking an injunction and a declaratory judgment against the appropriation of tribal lands by the State Power Authority. After a temporary injunction had been granted the court also granted defendant's motion for a change of venue to the district where the disputed lands are situated. 161 F.Supp. 702, 3 Race Rel. L. Rep. 715 (S.D.N.Y. 1958). In the Western District of New York the complaint was dismissed. That court held that if the fee to the lands was not in the state, it was privately held and subject to the state's power of eminent domain, there being no bar to the exercise of this power under federal law. The court declared that there was statutory authority for plaintiff to bring suit in the New York Court of Claims to determine the amount of just compensation for the taking, and that that court was the proper forum for such a question. 164 F.Supp. 107, 3 Race Rel. L. Rep. 1021 (W.D.N.Y. 1958). On appeal the United States Court of Appeals for the Second Circuit, modified the judgment. The exercise of eminent domain in this situation must be by the United States through Congress, the court said. Further, although Congress did not

expressly authorize the taking, this could be inferred from the size of the Niagara Power Project and its proximity to appellants' reservation. The State Power Authority as an agent of Congress could exercise the power of eminent domain only in the manner Congress had prescribed—*i.e.*, through proceedings in the federal district court or in state courts. Therefore, the court held that it was improper for the Authority to proceed under a state law permitting appropriation of land and eviction of owner without judicial proceeding. The judgment of the district court, dismissing the complaint and therefore preventing a declaration of rights, was reserved. 257 F.2d 885 (2d Cir. 1958).

On September 8, Justice Harlan, when petitioned to stay the Second Circuit mandate pending the filing and determination of the Indian Nation's petition to the Supreme Court for certiorari, allowed the mandate to issue, but stayed execution of it subject to certain stated conditions. The opinions of the Court of Appeals for the Second Circuit and of Mr. Justice Harlan are set out below:

Court of Appeals Opinion

Before SWAN and MOORE, Circuit Judges, and ANDERSON, District Judge.

MOORE, Circuit Judge.

The appellant Tuscarora Nation of Indians (referred to as "Tuscarora") brought this action in the federal court under 28 U.S.C.A. §§ 1331, 2201 and 2202: (1) for a declaratory judgment to the effect that the appellees, Power Authority of the State of New York, Robert Moses, and Superintendent of Public Works of the State of New York, John W. Johnson, have no power to acquire a portion of their lands without the express consent of the United States and (2) for a permanent injunction against the appropriation of their lands without their consent.

The suit was commenced on April 19, 1958 in the Southern District of New York, and was later transferred (161 F.Supp. 702) to the Western District, where it was heard on the merits. The decision of June 24, 164 F.Supp. 107, ordered (1) that the Power Authority's motion for a three judge court be denied; (2) that the temporary restraining order previously issued be dissolved; (3) that plaintiff's motion for a permanent injunction be denied; (4) that the complaint be dismissed without costs; and (5) that the affidavit of Henry S. Manley be stricken as an affidavit and be considered as an additional brief on behalf of the defendants. The appeal is taken pursuant to 28 U.S.C.A. § 1291.

The Tuscarora are a tribe of American Indians occupying lands in western New York. They migrated to central New York State from North Carolina prior to the American Revolution and became a part of the Iroquois Confederacy, sometimes referred to as the Six Nations. Subsequent to the Revolution New York State desired to move the Oneidas and Tuscaroras from central New York to the territory of the Senecas in western New York. As a result of sales of the Indians' rights of occupation the main body of Tuscaroras moved to Niagara County where they acquired three tracts of property. The first tract, a mile square (640 acres), was a right of occupancy conceded to them by the Senecas. The second tract (1280 acres) was a gift from the Senecas and the Holland Land Company. The third and largest tract, and the only tract involved in this litigation, consists of 4329 acres. This third tract was acquired in 1804 (title finally taken in 1809) for the Tuscarora through the good offices of the Secretary of War of the United States. The Tuscarora purchased the fee to this tract from the Holland Land Company out of the proceeds received from the sale of their North Carolina properties. Since that time the Tuscarora have lived on these tracts as a tax-exempt Indian Reservation despite the fact that the third tract was acquired by purchase and not as a grant from the United States.

[*Directed by State*]

The Power Authority of the State of New York is in charge of the development of a power project in western New York known as the Niagara River Power Project. This project was authorized by Congress and made possible by a treaty with Canada (February 27, 1950), which greatly enlarged the amount of water from the

Niagara River available to the United States for power purposes. Following the treaty Congress through Public Law 85-159 (Act of August 21, 1957, 71 Stat. 401, 16 U.S.C.A. §§ 836, 836a) authorized and directed the Federal Power Commission to issue a license to the Power Authority for the construction and operation of a power project with capacity to utilize all of the United States' share of the water permitted to be diverted under the terms of the treaty. The license was issued on January 30, 1958. On March 28, 1958 the Power Authority filed a petition in the Supreme Court of the State of New York for Niagara County to condemn 1,383 acres of the Reservation lands of the Tuscarora Nation of Indians whose entire Reservation consisted of 6,249 acres. The portion sought to be condemned was planned to be used for a water storage reservoir in connection with the Niagara power project. On April 15, 1958 the Power Authority withdrew the condemnation proceedings in the Supreme Court of New York and by filing a map of the 1,383 acre portion of the Tuscarora Reservation pursuant to § 30 of the New York State Highway Law, McKinney's Consol.Laws, c. 25, and Article 5, Title 1 of the Public Authorities Law, McKinney's Consol.Laws, c. 43-A, appropriated the 1,383 acres for the purpose of the reservoir. At the same time a sum estimated by the Power Authority to be the fair market value of the appropriated land was, as required by Statute, deposited with the Comptroller of the State of New York. The provisions of § 30 of the New York Highway Law authorize the Power Authority, after filing the map and depositing the money, immediately to enter upon and take possession of the property described.

[*Record Power Plant*]

A power plant has been planned which will be the largest hydro-electric project in the United States. The total cost is estimated at upwards of $625,000,000 and contracts have already been authorized for more than $339,000,000. An essential part of the project is a large water storage reservoir of at least 600,000 acre feet. Construction work and power lines relocation are now at the very edge of the Tuscarora Reservation.

Although both parties have given the court the benefit of the historical development of title to Indian lands in New York State and the various treaties relating thereto, this background material affects largely tracts 1 and 2 which are not now before the court. Since tract 3 was acquired in fee by purchase the primary question is: What laws and treaties apply to, and what other obligations have been assumed by the United States and the State of New York with respect to, this particular Indian Reservation?

Appellant claims that the taking of a portion of its Reservation is in violation of Title 25 United States Code, Sections 177 and 233. Appellees, on the other hand, assert that these statutes do not apply to the State of New York which possesses sovereign power of condemnation over Indian lands, independent of and never surrendered to, the Federal Government, derived from its status as one of the original thirteen colonies.

[*Non-Intercourse Acts: State and Federal*]

In order to prevent Indians from being victimized by artful scoundrels inclined to make a sharp bargain, both New York and the United States from an early date imposed restrictions on the acquisition of lands from the Indians by private persons unless adequate protection was afforded. Thus in 1777 the first Constitution of New York State provided that "no purchases * * * shall be binding * * * or deemed valid, unless made under the authority and with the consent of the legislature of this State" (Article XXXVII). This provision, in substance, has been continued in subsequent constitutions, Const. art. 1, § 13.

In 1790 the United States enacted its first Indian Non-Intercourse Act which imposed a similar restriction against sale "unless the same shall be made and duly executed at some public treaty, held under the authority of the United States" (1 Stat. 138). A second Non-Intercourse Act was passed in 1793, 1 Stat. 329. Other acts embodying substantially the same restrictions were enacted but the statute remains in virtually the same form today. Thus 25 U.S.C.A. § 177 provides:

> "*Purchases or grants of lands from Indians.* No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being

employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

[*Subsequent Laws and Decisions*]

As time passed the states were given more and more power to apply their laws in the Reservations of the Indians. Appellees refer to many cases, spread over a century and a half or more of dealings between the State of New York and the Indians within its boundaries, relative to Indian Reservations or tribal lands, reveal transfers in which parcels of land or interests therein, such as highways, easements for telephone lines and other takings short of the seizure of the whole or a substantial portion of such Reservations or tribal land, have been taken, granted or conveyed without special authorization by Congress and with the express, or at least tacit, acquiescence of the executive official of the United States chargeable with the responsibility for Indian affairs. A great majority of these cases have been in the State Courts of New York and two or three have been in the District Court of the United States. An examination of these cases discloses that between the earliest years of this Nation's existence and 1950, a large measure of social and economic intercourse relating to Indian tribal matters in the State of New York has been left to the State of New York through either the indifference or approval or express authorization of the federal executive officials who at a particular time had the responsibility for the care of the Indians. Despite this situation the Court of Appeals of New York has recognized that during all of this period, the Indians are and always have been, since the formation of this Government, the wards of the Nation and not of the States, and that the Federal Government has never relinquished its suzerainty over them.

In both criminal and civil fields Congress allowed the State laws to be extended onto the Reservations. However, in the act of September 13, 1950, 25 U.S.C.A. § 233, granting to the courts of New York State jurisdiction in civil actions between Indians, there were specific exceptions, the first being that nothing therein contained shall be construed as subjecting the lands within Indian Reservations in the State of New York to taxation or subjecting them to execution on any judgment except a judgment by one tribal member against another as to use or possession of land; and second, "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Reservation in the State of New York; * * *." This second exception was made the subject of comment in the Report of the Joint Legislative Committee on Indian Affairs to the Legislature of the State of New York as follows:

> "Neither would the proposed law permit taxation or alienation of reservation land, although many Indians have been led to believe that these are the very ends the bills aim to accomplish.
>
> "Specific exclusion of the powers of taxation and disturbance of titles makes it clear that adoption of the bills would not end all Federal guardianship * * *."

[*The Power Authority's License*]

The Power Authority claims to have derived its authority from a license issued to it pursuant to Public Law 85-159, 71 Stat. 401 which authorized and directed the Federal Power Commission to issue a license to the Power Authority for the construction and operation of a power project to utilize all of the United States' share of the water of the Niagara River permitted to be used by International agreement. Such a license was issued to the Power Authority although vigorously opposed by the Tuscarora. The Commission, however, did not pass on the eminent domain question because it expressly declared "The question of whether the Licensee is empowered to acquire Intervener's land in eminent domain proceedings is, in our view, a question to be resolved by a court of competent jurisdiction. In any event, we are of the view that we are not required to render an advisory opinion on that question." A petition for review of the Commission's order is presently pending

before the Court of Appeals for the District of Columbia.

Under § 4(e) of the Federal Power Act, 16 U.S.C.A. § 797, the Commission is authorized to issue licenses for the purpose of constructing reservoirs and power houses, etc., even "upon any part of the public lands and reservations of the United States" except that such a license "shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the Department of Interior under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization for such reservations: * * *."

[*Acquisition of Property*]

The acquisition of property for the construction of reservoirs, etc., is implemented by § 814 of the Federal Power Act which provides for the exercise by the licensee of the right of eminent domain. The section specifically provides for the manner in which this power may be exercised, namely, "It may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. * * *"

Over the last one hundred and fifty years there have been many court decisions relating to the rights of Indians. Although each case was decided on the facts which gave rise to the controversy, there has been uniform support for the doctrine that the Indian tribes are wards of the United States and that a general guardianship power is vested in the United States to protect them and their property. This philosophy on the part of the courts has been expressed in various ways.

In the New York Court of Appeals, People ex rel. Cusick v. Daly, 1914, 212 N.Y. 183, 105 N.E. 1048, 1049, the court, after referring to the Supreme Court's decision in the Kagama case (United States v. Kagama, 1886, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228), which stressed the fact that the Reservation had been set apart by the United States said: "But these were not the controlling elements in the decision, as will be seen from a perusal of the whole opinion, for the power of the federal authorities was asserted primarily because the Indian tribes in this country were, and always had been since the formation of the government, the wards of the nation and not of the states." This case dealt specifically with the Tuscarora Indians. The court traced their history from their North Carolina days to their final Reservation in Niagara County, saying: "Interesting as these facts may be to the student of history, they have little bearing upon the question to be decided. The truth is that we are dealing with dual relations growing out of peculiar conditions. The state of New York has enacted laws conferring upon these Indian tribes certain powers to regulate their own affairs, and to protect their lands from invasion (see Indian Law, Consol.Laws, Ch. 26), but the federal government has never relinquished its suzerainty over them." The court further held that there was "no less reason for placing them [the New York Indians] under the protectorate of the federal government than there was for extending it to the other tribes resident in any of the original 13 colonies" (212 N.Y. at page 192, 105 N.E. at page 1050). The court continued "Congress has continued to act upon the theory that it has jurisdiction of our New York Indian tribes no less than of their brethren in the west" (212 N.Y. at page 193, 105 N.E. at page 1051). The conclusion of the court was that "From this confusing history of federal and state legislation and judicial decisions upon matters affecting the relations of our governments to the Indians, it will be seen that the question is not free from doubt, but there are a few considerations which incline us to the view that the federal jurisdiction must prevail" (212 N.Y. at page 196, 105 N.E. at page 1052).

[*Wards of Nation*]

The Cusick case was followed by Mulkins v. Snow, 232 N.Y. 47, 133 N.E. 123, in which the court said "They [the Indians] are the wards of the nation, and Congress has full authority to legislate for them within their reservation. People ex rel. Cusick v. Daly, 212 N.Y. 183, 105 N.E. 1048. When the state of New York legislates in relation to their affairs, its action is subject to the paramount authority of the federal government" (232 N.Y. at page 51, 133 N.E. at page 124).

In the Supreme Court of the United States this guardianship has been frequently restated. It was described in the Kagama case, supra [118 U.S. 375, 6 S.Ct. 1114], as follows:

"* * * These Indian tribes *are* the wards of the nation. They are communities *de-*

> *pendent* on the United States, dependent largely for their daily food; dependent for their political rights. * * * From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by congress, and by this court, whenever the question has arisen."

In United States v. Candelaria, 271 U.S. 432, 439, 46 S.Ct. 561, 562, 70 L.Ed. 1023, the court said:

> "'Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long-continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, *whether within its original territory* or territory subsequently acquired, and whether within or without the limits of state. * * * "It is for that body [Congress], and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage."'"

Not only has Congress not abandoned the field with respect to the property interests of Indian tribes in the State of New York but it has, by the enactment of the express reservation concerning land interests of the Indian tribes in New York in Title 25 U.S.C.A. § 233, pointed up and reaffirmed its paramount authority over Indian tribal lands.

The primary question now to be decided is whether sections 177 and 233 of Title 25 U.S.C.A. prohibit the taking of any portion of the lands of the Tuscarora or whether the general power of the sovereign, namely, the United States, to take the lands of any of its subjects for appropriate public purposes, provided just compensation is paid, is paramount and impliedly written into all statutes affecting property.

A secondary question is, assuming that power of eminent domain exists, has it been exercised by the proper authority and in the manner prescribed by law?

Were the lands in question owned by citizens other than Indians, there would be no question but that the power of eminent domain could be exercised for the purposes of the power project. To create an exception it must be found that the Indians occupy some special status which renders them immune from the application of this principle. For many years their Reservations have been specially protected by law. They have practiced their own tribal customs and enjoyed their own way of life without too much outside interference. The present appropriation calls for the destruction of approximately one-third of the entire Reservation embraced within tract number 3. Unless there is some over-riding need or equity in others, the situation would seem to call for the exercise of that guardianship protection which the United States has asserted and exerted over the years.

[*Effort to Assimilate*]

On the other hand, as years go by there has been conscious effort to assimilate the Indians into the communities in which they live and to extend to them the same equal protection of the laws as all other citizens enjoy. This view is well exemplified in the Senate Report which preceded the passage of the civil jurisdiction bill in 1950 in which it was said that:

> "Your committee believes that all citizens of a State should be parts of one social order; that anything which conflicts with this principle should be brought into conformity therewith at the earliest time consistent with justice; that the civil relationship and responsibility of all citizens within a State should be equal as well as just and under the jurisdiction of a common code of laws that govern all and protect all alike." Sen.Rep. No. 1836, June 15, 1950.

If the Indians are to enjoy equal protection of the laws and all the other benefits extended to each citizen it may well be that they should bear some of the burdens including that of being subjected to having their lands condemned for public purposes, beneficial to the State in which they live.

The sovereign power of the United States is exercised by Congress and it would be

anomalous indeed if this very power which could make its own land subject to condemnation (16 U.S.C.A. § 797) could not be extended to the land of those over whom it exercises its guardianship. This power has been asserted from time to time as, for example, in the Reclamation Acts, the appropriation of vast areas in the mid-west for irrigation and other public projects. In Henkel v. United States, 237 U.S. 43, 49, 50, 35 S.Ct. 536, 539, 59 L.Ed. 831, the Supreme Court said:

> "The authority of the Congress of the United States to devote these lands to irrigation purposes is unquestioned. As a matter of fact, it might, if it saw fit, remove the Indians therefrom and devote the land to such uses. Recognizing the injustice of arbitrary appropriations to other uses, no effort has been made to take these lands without compensation to the Indians for the improvements which they have made, and they have been given the right to select other lands in place of those released. The reclamation projects undertaken by the government are very extensive and cover many states; and they must involve in their construction, the flooding of lands in connection with dams designed to hold water for such purposes; and must necessarily include much territory which is included in Indian reservations. This situation was of course well known to Congress when it passed the Reclamation Act, and we cannot doubt, in view of the broad authority conferred by sections 7 and 10, above quoted, that it was the purpose of Congress to give the Secretary of the Interior the right to acquire such rights as are here involved, when necessary for reclamation purposes. In carrying out the purposes of the act, the Secretary of the Interior is authorized to acquire any rights or property necessary for that purpose, and to acquire the same either by purchase or by condemnation. He is specifically authorized to perform any and all acts necessary and proper for the purpose of carrying into effect the provisions of the act. Authority could hardly have been conferred in more comprehensive terms, and we do not believe it was the intention of Congress, because of the Indians' right of selection of lands under the circumstances here shown, to reserve such lands from the operation of the act. To do so might defeat the reclamation projects which it was evidently the purpose of Congress to authorize and promote. * * *"

The power of condemnation was also recognized in the passage of section 409a Title 25 U.S.C.A. which provides that "Whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public-improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, * * *" the proceeds therefrom may with the approval of the Secretary of the Interior be reinvested in other lands selected by the Indians and shall become restricted as to alienation and taxability as the lands condemned.

[*No Constitutional Requirement*]

The court below came to the conclusion that "There is no constitutional requirement that the appropriation now involved be specifically authorized by an act of Congress" and that neither sections 177 nor 233 of Title 25 U.S.C.A. presented any bar to the exercise of eminent domain. The wording of these two statutes does not, in our opinion, lead to such a conclusion. However, the same result is reached because the right of eminent domain of the United States is superior to, and could not have been extinguished by, the statutes in question. Of necessity, however, the exercise of this power must be by the United States through Congress.

This power may be found in the direction given to the Federal Power Commission to issue a license to the Power Authority (71 Stat. 401) and the right granted to a licensee to use the right of eminent domain. Appellant challenges this approach by arguing (1) that the Federal Power Commission cannot thus usurp the authority of Congress and (2) that any taking of Tuscarora property must be by special enactment directed to Tuscarora land. General acts, the Tuscarora say, will not suffice.

There is no question that Congress has the constitutional authority to take Indian Reservation or tribal lands by eminent domain. Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 641, 10 S.Ct. 965, 34 L.Ed. 295. There remain to be determined whether in delegating its power of condemnation to the Power Authority, Congress expressly or impliedly intended

to authorize the taking of Indian Reservation or tribal lands (as distinct from lands allotted to Indians in severalty, 25 U.S.C.A. § 357); and whether in the course of its condemnation procedure the Power Authority complied with the pertinent provisions of the Federal Power Act.

Congress did not expressly authorize the taking of the appellant's land for the Niagara Power Project. Can it be inferred from the nature of the project and its proximity to the Reservation or from the impracticability of constructing it without taking a portion of the Tuscarora Reservation that Congress intended to authorize such a taking? Western Union Telegraph Co. v. Pennsylvania Railroad Co., 195 U.S. 540, 25 S.Ct. 133, 49 L.Ed. 312; Spalding v. Chandler, 1895, 160 U.S. 394, 16 S.Ct. 360, 40 L.Ed. 469; Seneca Nation of Indians v. Brucker, U.S. District Court, District of Columbia, Civil No. 2202–57, dated March 24, 1958 (unreported), and cases cited therein. Such an inference may properly be drawn when consideration is given to the size and extent of the Niagara Power Project.

[*Plant Capacity*]

The electric plant will have a capacity of 2,190,000 kilowatts, the largest hydroelectric plant in the United States, and will produce annually some 13,000,000,000 kilowatt hours of energy. To accomplish this result a large storage reservoir is essential for the efficient use of the available water supply.

The legislative history of the Niagara River Hydroelectric Power Project, 85th Congress, First Session, 1957, Vol. 2, U.S. Congressional and Administrative News, page 1585 et seq., shows that in the hearing before both Houses of Congress, the redevelopment plan contemplated "a pump-storage plant at the top of Niagara escarpment 0.8 mile east of Lewiston, where water would be pumped during the night hours to a reservoir with surface area of 850 acres * * *." While this acreage is less than that now sought to be taken, it may be assumed that Congress had general knowledge of the terrain and the pertinent area and that appellant's Reservation was in the vicinity and likely to be taken in part for the purposes of the project.

The direction to the Federal Power Commission was specific, namely, "to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara Power permitted to be used by International agreement." The licensee by virtue of section 814 becomes vested with the governmental power of eminent domain. The exercise of the right is thus the act of an agency of the sovereign. But just as the grant is given by Congress it should be exercised in the manner prescribed by Congress which is either in the district court where the property is located or in the state courts. The appellees, although they started their condemnation proceedings in the State court, chose to abandon that method and proceeded under New York Public Authorities Law (specifically passed in 1958) and the New York Condemnation Law, McKinney's Consol. Laws, c. 73 giving the Power Authority the right to proceed by appropriation under section 30 of the New York Highway Law. If Congress had intended this procedure to be followed, section 814 instead of providing "in the State courts" would have to read "or in such manner as may be prescribed by the legislature of the state in which the property is located." The specific 1958 legislation dealing with the Niagara River project enables the Power Authority to move in, appropriate the land and remove the owner before he has had a chance to have a judicial hearing. If Congress wishes this to be the method of eviction it should at least so declare in specific terms.

[*Final Question*]

The final question is, what relief should be granted? The construction workers are on the borders of the Reservation ready to install power lines and cover the land with fill for the reservoir dikes. Nevertheless, aggressive construction activity should not be sufficient to nullify the protective policy of the Government towards the Indians or the laws calculated to enforce that policy. The Congressional concern, exhibited as recently as 1950, to except the two elements most carefully guarded by the Government, namely, tax exemption and alienation, from transfer to the civil jurisdictional powers of the State of New York is ample evidence that "guardianship" still exists. If the Indians are no longer to be the wards of the United States such a change should be by Congressional enactment and not by court decision.

The court below dismissed the complaint thus preventing any relief by way of declaration of

rights. This portion of the judgement should be reversed. Since the complaint seeks a declaration of rights we hold that the Power Authority of the State of New York as a licensee of the Federal Power Commission directed to issue a license pursuant to Public Law 85–159 (Act of August 21, 1957, 71 Stat. 401) is authorized to exercise the right of eminent domain according to the procedures specified in section 814 of the Federal Power Act (16 U.S.C.A. § 814).

Pending the final determination of this action or any proceeding seeking to acquire the property in question, appellees are stayed from entering upon or damaging lands within the Tuscarora Reservation except that appellees shall have the right to conduct, and continue with, such activities on said property as have been excluded from the stays heretofore entered as amended from time to time.

The proceedings taken to appropriate the property in question by the filing of maps, notices or other documents pursuant to the Highway Law and the Public Authorities Law of the State of New York are vacated and annulled.

The District Court, in the event that the Power Authority desires to exercise its right of eminent domain in that court, is requested to expedite all proceedings as much as possible.

Insofar as the judgment appealed from dismisses the complaint and denies a stay it is reversed.

Insofar as the decision below holds that the Power Authority has the right to exercise eminent domain it is affirmed.

The cross-appeal with reference to the affidavit of Henry S. Manley is affirmed. It is sufficient that the material therein contained be received within the limitations fixed by the court below.

The judgment should be modified in accordance with this opinion. No costs.

* * *

SWAN, Circuit Judge (dissenting).

I disagree with the majority opinion only in its holding that condemnation by appropriation pursuant to the state statutes is not permissible under § 21 of the Federal Power Act and the license issued by the Commission. In my opinion the judgment should be affirmed. The reasons which have led me to this conclusion have not been persuasive to my brothers, and I refrain from stating them here in order to avoid delaying the decision of the court.* * *

* * *

ON PETITION BY APPELLANT FOR REHEARING; AND MOTION BY APPELLEES FOR CLARIFICATION OR MODIFICATION OF THE STAY PROVISIONS OF THIS COURT'S JUDGMENT OF JULY 24, 1958.

PER CURIAM.

The petition for rehearing is denied, and it is ordered that the mandate shall be issued six days after the date hereof.

Upon issuance of the mandate, the stay granted in the opinion of this court "pending final determination of this action" will cease. Consequently after issuance of the mandate the answer to each of the three questions raised in the motion for clarification is "No."

Opinion in Supreme Court

HARLAN, Associate Justice.

Petitioner Tuscarora Nation of Indians asks me to stay the mandate of the Court of Appeals for the Second Circuit pending the filing and determination of Tuscarora's petition for certiorari to review the judgment of that court, filed July 24, 1958, 257 F.2d 885, which so far as now material (1) adjudged that respondent Power Authority of the State of New York, as licensee of the Federal Power Commission for the construction of the so-called Niagara Power Project at Niagara Falls, New York, has the right under § 21 of the Federal Power Act, 16 U.S.C. § 814, 16 U.S.C.A. § 814, to acquire petitioner's land by condemnation proceedings, and (2) directed any federal district court in which such proceedings might be instituted to proceed with as much expedition as possible.

On August 26, 1958, the Court of Appeals, on petitions for rehearing and for clarification filed by Tuscarora and the Power Authority respectively, adhered to its judgment, directed that its mandate issue six days thereafter, and rendered inoperative, upon the issuance of the mandate, certain stay orders which had theretofore restricted in some respects the Authority from entering upon the Tuscarora lands pending the outcome of condemnation proceedings to acquire them.

On July 29 the Power Authority commenced such condemnation proceedings in the United

States District Court for the Western District of New York, and on August 27 noticed for hearing before that court at 2 p.m. on Monday, September 8, a motion for summary judgment upon its complaint.

[*Another Pending Action*]

There is also pending undetermined in the Court of Appeals for the District of Columbia Circuit a proceeding instituted by Tuscarora to review the validity of the license issued by the Federal Power Commission to the Power Authority, insofar as it purports to include petitioner's lands within the Niagara Power Project. Both sides agree that the Court of Appeals' decision in this proceeding cannot be expected at the earliest before late November or December.

On August 31, in order to afford adequate opportunity for consideration of the application now before me, I temporarily stayed the issuance of the mandate of the Court of Appeals for the Second Circuit pending my decision on the application, and at the same time set the matter for oral argument on September 6.

Tuscarora concedes, as I think it must, that the validity of the Power Authority's federal license is a matter lying exclusively within the jurisdiction of the Court of Appeals for the District of Columbia Circuit. 16 U.S.C. § 825*l*(b), 16 U.S.C.A. § 825*l*(b); cf. City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 334-337, 78 S.Ct. 1209, 1217-1219, 2 L. Ed.2d 1345. That being so it is difficult for me to believe it likely that this Court would grant certiorari to review the judgment of the Court of Appeals for the Second Circuit, since the Power Authority's right to acquire Tuscarora's lands by condemnation would ultimately seem to depend upon its federal license which is presently in force and whose validity is subject to review only by the Court of Appeals for the District of Columbia Circuit. See § § 3(2), 4(e), and 21 of the Federal Power Act, 16 U.S.C. § § 796 (2), 797(e), 814, 16 U.S.C.A. § § 796(2), 797(e), 814. Nevertheless in the time at my disposal I have not been able to satisfy myself completely that in this unusual situation four members of the Court would not be persuaded to grant certiorari, or that the Court, were certiorari to be denied, would not consider that Tuscarora was nevertheless entitled to some form of interim relief for the protection of the lands in question pending the outcome of the proceedings touching the validity of the Power Authority's federal license. I am particularly constrained not to reach such conclusions at this stage of the matter because of a number of factors which seem to me to point to a solution of this application that is fair to both sides.

The Power Authority represents that if it obtains from the District Court for the Western District of New York a decree of condemnation putting it into immediate possession of the Tuscarora lands, it will proceed forthwith to erect power lines around the site of the proposed reservoir which is part of the Niagara Power Project, and further that the Authority will be exposed to substantial financial losses if this work cannot be instituted by September 15. On the other hand the Authority states that it can defer, without serious inconvenience or financial loss, other aspects of the Project involving use of Tuscarora land at least until the middle of October.

[*Tuscarora's Petition*]

I am advised by the Clerk of the Court that if Tuscarora's petition for certiorari and the Power Authority's response thereto are both on file by September 30 the matter may be considered by the Court at its first Conference of the new Term beginning October 6. In normal course this should enable the Court's action on the petition for certiorari to be announced on October 13.

Counsel for the Power Authority states that he will be prepared to file the Authority's response within 10 days after the filing of the petition for certiorari.

In light of the foregoing I shall make the following disposition of Tuscarora's present application: The mandate of the Court of Appeals for the Second Circuit shall be allowed to issue, but the execution and enforcement of the judgment entered pursuant thereto shall be stayed pending the filing and determination of Tuscarora's petition for certiorari, except to the extent that it bears upon the Power Authority's right to acquire in the pending condemnation proceedings Tuscarora's lands and the possession thereof for the purpose of constructing power lines around the proposed reservoir included in the Niagara Power Project, subject however to the following terms and conditions:

1. Tuscarora's petition for certiorari shall be filed on or before September 19, 1958;

2. The Court shall have announced its action on the petition for certiorari by October 13, 1958;

3. If the Power Authority's response to the petition for certiorari shall not have been filed on or before September 30, 1958, or if the Court for any other reason shall not have announced its action on such petition by October 13, 1958, then in either event Tuscarora shall have leave to apply for a further stay; and

4. If the petition for certiorari is denied, this stay shall expire on the third day following the Court's order to that effect.

5. In the event that petition for certiorari is granted, the stay is to continue pending the issuance of the judgment of this Court.

This disposition will enable Tuscarora to put its case to the full Court, without unduly tying the hands of the Power Authority in the interval.

MISCELLANEOUS ORDERS
The United States Supreme Court:

Probable jurisdiction on appeal noted:

Lassiter v. Northampton County Board of Elections (Prior decision 102 S.E.2d 853, 3 Race Rel. L. Rep. 495 [N.C. Supreme Court, 1958] upholding the constitutionality of North Carolina literacy requirements for voting). No. 584 (originally docketed as No. 229 Misc.), December 15, 1958, 27 L.W. 3186, order: "The motion for leave to proceed *in forma pauperis* is granted. In this case probable jurisdiction is noted and the case is transferred to the appellate docket and placed on the summary calendar." Other decisions: 2 Race Rel. L. Rep. 706, 832 (1957).

Denied certiorari (i.e., declined to review):

Buchanan, et al. v. Evans, et al. (Prior decision 256 F.2d 688, 3 Race Rel. L. Rep. 901 [3rd Cir. 1958] affirming a district court decision requiring admission of Negro children to certain Delaware public schools and ordering submission by certain dates plans for statewide public school desegregation). No. 260, October 13, 1958, 79 S.Ct. 58. Other decisions: 2 Race Rel. L. Rep. 7, 301, 781 (1957).

Tuscarora Nation of Indians, et al. v. Power Authority of the State of New York, et al. (Prior decision 79 S.Ct. 4, 3 Race Rel. L. Rep. 1122 [1958] in which Mr. Justice Harlan stayed execution of a mandate of the United States Court of Appeals for the Second Circuit pending determination of petition for certiorari). No. 384, October 13, 1958, 79 S.Ct. 66. Other decisions: 3 Race Rel. L. Rep. 715, 1021, 1122.

Ware v. Beach (Prior decision 322 P.2d 635, 3 Race Rel. L. Rep. 521 [Okla. Supreme Court, 1958], affirming probate court decision permitting widower of Indian woman to elect statutory inheritance against provisions of will, although he was not enrolled as Indian at time of wife's death per requirement of subsequently-enacted federal statute). No. 117, October 13, 1958, 79 S.Ct. 31.

Cases Docketed:

Barta v. Oglala Sioux Tribe of the Pine Ridge Reservation (Prior decision 259 F.2d 553 [8th Cir. 1958]) involving federal jurisdiction of suits in name of United States on behalf of Indian tribe to collect from non-member lessees of tribal trust lands tax levied under approved tribal constitution. No. 548, December 1, 1958, 27 L.W. 3177.

Cohen v. Public Housing Administration, et al. (Prior decision 257 F.2d 73, 3 Race Rel. L. Rep. 700 [5th Cir. 1958] affirming district court dismissal of suit to compel admission to a public housing project in absence of any attempt to apply). No. 505, November 8, 1958, 27 L.W. 3161. Other decisions: 1 Race Rel. L. Rep. 347, (1956), 2 Race Rel. L. Rep. 109, 1122 (1957).

Cooke v. State of North Carolina (Prior decision 193 S.E.2d 846, 3 Race Rel. L. Rep. 687 [N.C. Supreme Court, 1958] holding that in a prosecution of Negroes for trespassing on city-owned golf courses which had been leased to a private operator the trial court is not required to take judicial notice of facts found in a civil action in federal district court that had enjoined racial discrimination in operation of the same facilities). No. 466, October 22, 1958, 27 L.W. 3135. Another decision: 2 Race Rel. L. Rep. 818 (1957). See also, *Simkins v. City of Greensboro,* 149 F.Supp, 562, 2 Race Rel. L. Rep. 605 (M.D.N.C. 1957); *aff'd* 246 F.2d 425, 2 Race Rel. L. Rep. 817 (1957).

Oliphant, et al. v. Brotherhood of Locomotive Firemen and Enginemen (Prior decision ..... F.2d ....., 3 Race Rel. L. Rep. 1195 [6th Cir. 1958] affirming a district court decision holding that the Railway Labor Act does not prevent racial discrimination in admission practices of unions certified as bargaining representatives under the Act, a union not being made a federal agency by virtue of such certification). No. 560, December 5, 1958, 27 L.W. 3177. Other decisions: 2 Race Rel. L. Rep. 1128 (1957), 3 Race Rel. L. Rep. 6 (1958).

Syres v. Oil Workers International Union, Local 23, et al. (Prior decision 257 F.2d 479, 3 Race Rel. L. Rep. 998 [5th Cir. 1958] holding that individual Negro plaintiffs could not recover vicariously on a theory of averages for damages allegedly suffered by members of their class from discriminatory provisions of an employment contract, but must prove actual, personal pecuniary loss). No. 510, November 10, 1958, 27 L.W. 3161. Other decisions: 1 Race Rel. L. Rep. 20, 192 (1956).

COURTS

EDUCATION
Public Schools—Arkansas (Little Rock)

John AARON, et al. v. William G. COOPER, et al., Members of the Board of Directors of the Little Rock, Arkansas, Independent School District, and Virgil T. Blossom, Superintendent of Schools.

United States Court of Appeals for the Eighth Circuit, November 10, 1958, No. 16,094

SUMMARY: Negro students petitioned federal district court on September 24, 1958, seeking to enjoin Little Rock public school officials from leasing to a private school corporation school properties which had been closed by order of the governor on September 12 under authority of statutes signed into law by him earlier the same day. The petition was dismissed on the ground that it could be granted legally only by a three-judge court. The school board commenced leasing activity, and on September 29, the Court of Appeals for the Eighth Circuit issued a temporary restraining order against further action. Materials involved in these developments are collected at 3 Race Rel. L. Rep. 851-895. Subsequently, after the restraining order was twice extended, the Court of Appeals ordered the judgment of the district court vacated, and ordered the cause remanded for entry of an injunction against the school officials taking any further action to transfer possession or control of public school properties to any person for the carrying on of segregated schools. The court also directed the taking of such affirmative steps as the district court might direct to facilitate and accomplish the integration of the Little Rock School District under the existing school plan.

Before WOODROUGH, JOHNSEN and MATHES, Circuit Judges.

PER CURIAM.

This case involves events which have occurred in the Little Rock, Arkansas, school situation since our decision in Aaron v. Cooper, 8 Cir., 257 F.2d 33, and since the decision of the Supreme Court in Cooper v. Aaron, 78 S.Ct. 1399 and 78 S.Ct. 1401.

The appeal is from an order of the District Court denying and dismissing an application by appellants for a writ of injunction.

Appellants are the six remaining Negro students, of the eight referred to in the Supreme Court's opinion, 78 S.Ct. at page 1407, who were enrolled in and had continued their attendance at the Central High School of Little Rock through the last school year, and who, under the School Board's plan of integration, were to have had the right to resume their studies there for the present school year, commencing in September, 1958. Appellees are the members of the School Board and the Superintendent of Schools of the Little Rock School District.

Our decision, supra, 257 F.2d 33, was rendered on August 18, 1958, holding that the District Court had not been warranted in granting a 2½-year suspension of the integration plan for the District, as approved and ordered carried into effect, merely because of the local hostility which had developed or been engendered against the initial desegregation step taken in the school system.

[*Assembly Convened*]

Thereafter, the Legislature or General Assembly of the State of Arkansas, on call issued by the Governor, convened in extraordinary session and on August 26, 1958, enacted two measures, known as Act No. 4 and Act No. 5 of the Second Extraordinary Session of the Sixty-first General Assembly, 1958. These bills, passed with

emergency clauses, were signed by the Governor on September 12, 1958, the day that the Supreme Court made announcement, 78 S.Ct. 1399, of its affirmance of our decision, with direction in its order "that the judgments of the District Court for the Eastern District of Arkansas, dated August 28, 1956, and September 3, 1957, enforcing the School Board's plan for desegregation in compliance with the decision of this Court in Brown v. Board of Education, 347 U.S. 483; 349 U.S. 294, be reinstated".

Act No. 4, supra, § 1 (A) and (B), empowered the Governor, by proclamation, to close immediately any school or all schools of a public school district, and required him in such event to call a special election, to be held within 30 days, for vote upon the alternative ballot propositions of "FOR RACIAL INTEGRATION OF ALL SCHOOLS WITHIN THE ..... SCHOOL DISTRICT", or "AGAINST RACIAL INTEGRATION OF ALL SCHOOLS WITHIN THE ..... SCHOOL DISTRICT". Unless a majority of the qualified electors of the district voted in favor of such integration, "no school within the district shall be integrated". § 2(D). It was further provided that a school which had been closed under the authority of the Act "shall remain closed until such executive order is countermanded by proclamation of the Governor * * *". § 4.

Act No. 5 was complementary to Act No. 4, in its provisions for withholding from a school district, in which the Governor had ordered a school closed, a pro rata share of the State funds otherwise allocable to such district and of the funds allocable from the County General School Fund, and in making such withheld funds available, on a per capita basis, to any other public school or any non-profit private school accredited by the State Board of Education (of which the Governor was a member), which should be attended by students of a closed school, with an obligation being imposed upon the State Board of Education in these circumstances to make such payments. §§ 2 and 3.

[*Grounds for Closing*]

One of the grounds specified in Act No. 4, on which the Governor was authorized to close a school and call an election was, "whenever * * * (c) he shall determine that a general, suitable, and efficient educational system cannot be maintained in any school district because of the integration of the races in any school within that district". Another was, "whenever * * * (a) he shall determine that in order to maintain peace against actual or impending domestic violence in any public school district, whereof (sic) the lives or limbs of the citizens, students, teachers or other employees of any school, or the safety of buildings or other property in the school district are endangered * * *". § 1 (B) (c) and (a).

Commencement of the new school year for the senior high schools of Little Rock had been set by the School Board for September 15, 1958. On September 12, 1958, the day the Supreme Court announced its decision, supra, 78 S.Ct. 1399, the Governor issued a proclamation, closing all four of such schools, on the two bases under Act No. 4 set out in the preceding paragraph hereof, and calling a referendum election in the district to be held on September 27, 1958. The Board had intended simply to continue such desegregation as had been established at Central High School during the preceding year.

In a separate statement on the situation, the Governor said that "Central High School can be operated on a private basis as a segregated school if the School Board wants to take such action". On September 18, 1958, he made telecast of his contemplated plans for effecting such a private, segregated operation of the Little Rock high schools.

In substance, he declared that, if the vote on September 27th was against integration, the high school buildings and facilities would become surplus properties; that they thus could be "found to be not needed for public school purposes" and could then be leased by the School Board to a bona fide private agency for the operation of private segregated schools; that such privately operated schools would not be subject to the decisions which had been rendered by the federal courts on integration, "even though the schools received aid from State and Federal sources"; that he was informed that a private, bona fide, non-profit corporation had already been formed, "for the purpose of being prepared to accept any offer that may be made by the Little Rock School Board to lease its unused high school facilities for private school purposes—if the vote is against integration on September 27th"; that he was confident that the vote at the election would be against integration; and that he was under the circumstances

now calling upon the School Board "to demonstrate their good faith by immediately offering to a private group these unoccupied school buildings after the election".

An Arkansas statute, on the books since 1875, provides: "The directors may permit a private school to be taught in the district schoolhouse, unless they be otherwise directed by a majority of the legal voters of the district". Ark. St. 1947, § 80-518.

After the Governor's telecast, and four days before the scheduled election, the members of the School Board and the Superintendent of Schools petitioned the District Court, in the previous integration-plan proceeding (in which the court had reserved supplementary jurisdiction) for instructions on whether, in the situation and circumstances above detailed, they would be guilty of a violation of any of the orders which the court had made in such proceeding, if they should "lease said school properties to private institutions for conducting a high school program on a racially segregated basis". The petition expressly pointed out the fact that, "If leases are consummated with such private organizations, (these) will then, upon accreditation of the schools (by the State Board of Education) be entitled to state financing under the terms of Act 5 of 1958". The petition also frankly stated that appellees were willing to enter into such leases and would officially engage in negotiations to this end, "if in so doing they will not subject themselves to charges of contempt for having violated a directive order of this Court".

[*Petition Denied*]

The court denied the petition for instructions, on the ground that it would be judicially improper for it to engage in rendering a mere advisory opinion in the situation. This ruling is not here involved, and the incident is referred to only because of the relation of the statements made by the Board in the setting which prompted appellants' injunction request.

The application of appellants to the District Court for an injunction was made on September 24th, the day following the filing of the School Board's petition for instructions. It alleged that the Little Rock Private School Corporation had by that time been formed, with the object of taking over and operating the Central High School and other of the closed high schools, on a racially segregated basis, as "private schools", and that appellees had been giving consideration to and contemplated leasing such properties to the Corporation for such purpose, in the event that the vote in the September 27th election was against integration, so that the high schools would, insofar as their operation by the District was concerned, be required by the prescription of Act No. 4 to remain closed. Showing on the application made before us for a temporary restraining order, as hereinafter referred to, indicated that there were approximately $800,000 in public funds of the State of Arkansas which would be available, under Act No. 5, supra, for operating the Little Rock high schools on such a leased, segregated basis.

The vote in the election, according to the published unofficial returns, was approximately 19,000 to 7,500, against racial integration. The election was held on a Saturday. Leasing negotiations were commenced between the Little Rock Private School Corporation and the School Board that same night, after the result of the election was known. The negotiations were continued on Sunday, September 28th, with the Attorney General of Arkansas sitting in and participating in his official capacity.

Meanwhile, counsel for appellants, after filing notice of appeal from the District Court's order of denial and dismissal of their injunction application, orally notified appellees that they were intending to make application on Monday, September 29th, at 10 o'clock a.m., in chambers, to the two Circuit Judges resident at Omaha, Nebraska, for a temporary restraining order.[1] The

1. Although 28 U.S.C.A. § 1651 (b) empowers an individual judge to issue an alternative writ or rule nisi, it has been the practice of the members of the Court of Appeals for the Eighth Circuit, by agreement among ourselves, to require (except in an extreme emergency situation) that any application for a writ receive the consideration of at least two judges of the Court, either as a quorum of the Court itself, if it is in session, or as a matter of concerted judgment in respect to individual action on the part of the senior of the two judges, if the Court is in adjournment and no special session has been authorized. This practice has been followed also as to applications for special stays, applications for bail, etc.

The object of the practice is to prevent any attempt at "shopping" as to such applications; to make the soundness of the action on such applications more certain; and to avoid the public unseemliness of a single circuit judge setting up his judgment against that of another individual judge (district judge).

In the situation here involved, the Court was in adjournment at the time appellants sought to present their application for an emergency restraining order, and there was not sufficient time to have the Chief Judge of the Court constitute and designate a division or panel of judges for a court hearing. Besides,

Little Rock Private School Corporation thereupon tried to prevail on appellees to execute a lease before appellants would have the opportunity to present their restraining-order application. At 1:30 a.m., on September 29th, the School Board adopted a resolution, authorizing its President and Secretary to execute a lease with the Private School Corporation, subject to a ruling by the Attorney General of Arkansas that such a leasing by the Board would in the situation be legal and proper. The time of 8:30 a.m. was set for the formal signing, and this act was engaged in and completed before 10 o'clock, when appellants presented their application at Omaha for a restraining order.

[*Resolution of Authority*]

The School Board's resolution of authority to its President and Secretary to execute the lease made recitation of the facts that the Governor had closed the Little Rock high schools; that such properties were therefore not in use and would not be required for public school purposes until the District would again be enabled by law to operate public high schools or would need the properties for further expansion of its other educational programs; that the Board was desirous of aiding any feasible plan leading to a high school educational program in the District, "although it is capable of and would prefer to operate its high schools as a part of the system of public education"; that the Board "was in doubt as to the efficacy of such a leasing arrangement" and for this reason had sought instructions from the District Court on whether it would be violating the orders of the court by executing such a lease; that the Governor of the State had called upon the Board to enter into such a private-school leasing arrangement; that any attempt by the Board to have the situation clarified through further legal action would work a postponement of the starting of the private school operations and result in a further impairment of "the high school educational program in * * * the School District"; and that the Board was accordingly declaring the four senior high schools to be surplus property, "until such time as the Little Rock School District requires all or part thereof for the operation of its public education program", and was on this basis authorizing the execution of a lease to the Little Rock School Corporation covering such schools.

Also, the Board's resolution authorizing the lease execution had attached to it the form and provisions of the instrument which the President and Secretary were to sign. The instrument covered a purported leasing not only of the four high school buildings but also of all equipment and teaching aids located in or used in connection therewith. The term was for 7 years (which incidentally was the length of time previously fixed by the Board's plan for completing integration in the Little Rock school system), "or for such time as the said leased property is not required for public education, whichever is shorter". A proviso, however, was added that "this lease shall terminate immediately and be held for naught in the event it is determined improper or invalid by final judgment of a court of competent jurisdiction". Rent was to be paid in the amount of the actual market rental value of the property, as determined at the end of each school semester by appraisers, but, if the lessee was "prevented from carrying out the objective of its incorporation", it was not obligated to pay rent except "during the period of usage", allocated on a monthly basis.

[*Obligation of Board*]

The School Board assumed the obligation of keeping the buildings in condition for the lessee's school purposes; of providing and paying for any guards necessary to insure protection of the property; and of paying for all the utility services involved in the lessee's operation. The lessee agreed to use the buildings and personal property for school purposes only and to keep its schools up to "the highest educational standards", so that the students could "obtain an education comparable to that obtainable in the Class A public schools of this state, including the

the application was one being made without service of written notice as required by our Rule 18 for submission of a matter to the Court. Appellants therefore could only undertake to present their application at chambers, and the only place in the Circuit where there were two judges together at the time, enabling them to make such application in accordance with the practice of the Court, was at Omaha, Nebraska. It was for this reason and on this basis that chamber presentation, consideration and ruling were engaged in at Omaha.

A restraining order was issued, and the matter was set down for hearing before the Court, at St. Louis, Missouri, on the question of a preliminary or interlocutory injunction. Such injunction against appellees was granted and is in effect, until the further order of the Court. Meanwhile the case was advanced for hearing on its merits, which is the matter now before us.

extra-curricular activities normally enjoyed by students in other schools, with particular reference to fitting and preparing said students * * * for higher education in colleges and universities, or for employment upon the completion of technical training". There was a provision also by which the Board subjected the Private School Corporation to the requirement of conforming to the "Administrative Policies of the Little Rock School District", as published by the Board in September, 1955.

The arrangements arrived at between appellees and the Private School Corporation extended also to the matter of the School Board assisting in making available to the Corporation the services of the teachers of the high schools, who were under contract with the District. The School Board consented to allow the Corporation to submit contracts to the teachers, of a form approved by the Board, which contained also a special agreement for execution between the School Board and the teacher. This special agreement provided that the named teacher was tendering his or her resignation to the School District, "saving any and all rights and privileges as authorized by Act 4" (supra), and that the School District was accepting the same, subject to the condition that, "should The Little Rock Private School Corporation be dissolved or discontinue the operation of any and/or all of the schools leased from the Little Rock School District, then said Little Rock School District hereby agrees to reinstate (the named teacher) to his or her previous status including salary and classification on the day immediately following his or her termination with the Little Rock School Corporation".

[*Provisions of Contract*]

It might also passingly be noted in relation to the setting that, while the Corporation was purporting to conduct merely a private school operation, there was inserted in its "Teacher's Contract" form a provision authorizing it "to make such deductions from the salary specified herein as may be required by Law for Teacher Retirement * * *". The State of Arkansas provides a "Teacher Retirement System", Ark. St. 1947, Cum. Pocket Supp., Ch. 14, financed by teacher assessments and State contributions. But such "Law for Teacher Retirement" has application only to those serving in public schools. Id., § 80-1437 (f) and (g). What the object or significance of the provision in the Corporation's contract, for making "deductions * * * required by Law for Teacher Retirement", was, we do not, however, presume here to consider, since it does not perhaps have an absolute connotation against the Board, such as the other circumstances detailed have, although the Board had approved the contract form and presumably had protectively insisted upon the provision for retirement-deduction being included.

The facts which have been set out clearly call collectively, as a matter of law, for an injunction against appellees. Appellees were under specific order of the District Court to carry out the integration plan for the District, which they had adopted, and to which both that Court and this Court had given approval. Their obligation in this respect had been further accented by the denial made of their request, after interference and other difficulties had arisen, for leave to disrupt and halt the operation of the integration plan. 78 S.Ct. 1399 and 78 S.Ct. 1401, aff'g 257 F.2d 33.

The edict thus reaffirmedly existing against them to move forward was in their capacity as "the agents of the State", or in other words their representativeness of the State as to the wrong and its correction. 78 S.Ct. at page 1408. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, (as emphasized in 78 S.Ct. at page 1410), had established as the supreme law of the land that it was a violation of the Fourteenth Amendment for a State or its instrumentalities to require or enforce racial segregation in its public school system. Appellees, as has been stated, stood under a specific decree of the federal courts to correct this constitutional violation as it had existed in the Little Rock School District, by putting appellants and the other members of their race into enjoyment of their rights in accordance with the provisions of the adopted and approved integration plan.

Any attempts, from whatever source occurring, to interfere with or prevent the carrying out of the integration plan, would not release appellees from the obligation of the judicial order against them. Obstructions to their taking of some step or steps in accordance with the plan might (dependent upon the circumstances) enable them to make defense to a charge of contempt for failure to execute, but this would not dissolve the order. And so, it necessarily would constitute

a disregard of their obligation for appellees, because they might believe that the execution of the integration plan had been effectively interfered with, to engage or assist in anything related to the situation inconsistent affectingly with the order, while the order stood judicially unchanged. Above all, would it be legally improper for them to take any affirmative step of action or collaboration, which either was intended or manifestly would serve to hamper or thwart the execution of such order.

The order, as has been indicated, was in its effect one against them as officers or agents of the State, imposing a direct command upon them to carry out, to the full extent of their official powers, the supreme law of the land, in ridding the Little Rock school system of its unlawful segregation. The existence of such an immediate command upon them would also inherently imply a prohibition against any use by them of their state powers, which would intendedly or resultingly prevent in any manner the carrying out of their obligation under the decree to effectuate the supreme law of the land, in accordance with the approved integration plan. In the judicial hold which thus existed against them, a court would ordinarily have no difficulty in, and would vindicatingly owe the duty of, transforming this implied prohibition, where necessary, into an express injunction.

[*Schools Closed*]

The Governor's order under Act No. 4, supra, had, of course, immediately served to close the Little Rock high schools. But the Act had not purported to abolish such schools as part of the Little Rock school system.[2] It merely provided that schools closed by the Governor should remain so until revocation of his order. Nor did § 80-518, supra, (the 1875 statute), impose any duty upon appellees to allow the Little Rock high schools to be used for private school purposes in such a situation. It merely empowers a school board, where it so desires, to "permit a private school to be taught in the district schoolhouse, during such time as the said house is not occupied by a public school * * *".

Thus, appellees in negotiating with the Little Rock Private School Corporation for use of the high school buildings and facilities by the Corporation were not even engaged in state mandated action but in voluntary acts of their own. They were simply yielding to the local desire or clamor and to the importuning of the Governor that they cooperate in the purpose of Act No. 4, supra, and the Governor's action thereunder. That purpose plainly and proclaimedly was to try to thwart integration—the thing which appellees were under judicial mandate to use their efforts and powers to achieve.

As has been observed, appellees were willing not only to lease the high school buildings to the Little Rock Private School Corporation, but also to provide the Corporation with all of the public-owned equipment and teaching facilities necessary to the conduct of such schools. And they further were willing to aid the Corporation in obtaining a teaching staff, by agreeing to allow the teachers of the high schools to sign contracts with the Corporation, without loss of their position and status in the District's school system, though obligating the Board to reinstate any such contracting teacher "to his or her previous status including salary and classification on the day immediately following his or her termination with the Little Rock School Corporation". And they did all of these things knowing, as their petition for instructions indicated, that the effect of these actions on their part would be to make the Corporation eligible for accreditation and allotment of state funds, under Act No. 5, supra, with which to operate such segregated high schools, in substitution or supersession of the District's mandatedly integrated schools.

[*Effect of Action*]

However worthy appellees may claim to have been their motive otherwise, they were nevertheless acting to make public buildings, equipment and other school-operating facilities available for the conduct of such segregated, successoral high schools. And they were knowingly assisting, by their acts and by their collaboration in effecting teacher-transfer, to qualify such intended segregated schools for state operating funds under Act No. 5. These actions on

2. Parenthetically it may be noted that Art. 14, § 1, of the Constitution of Arkansas, adopted in 1874, provides: "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous education". And the Supreme Court of Arkansas has held that high schools are ambraced within the term "system of free schools". Dickinson v. Edmondson, 120 Ark. 80, 170 S.W. 930, 932.

their part would of necessity complicate the achieving of integration in the School District. They would also further plainly serve to thwart, frustrate or impede the carrying out of the decree against appellees and the effectuating of appellants' rights thereunder, in that, inter alia, the making available of operative, substitute, free, qualified high school facilities for the white students of the District would naturally allay most of the parental clamor and pressure which could otherwise be expected to arise against any continued closing of the high schools, and which might practicably constitute a substantial factor in relation to a reopening of the schools.

As we have said, the facts involved call, in our judgment, for an injunction against appellees as a matter of law. But it is urged that we are without jurisdiction to direct the issuance of such an injunction, for the reason that appellants' application would be legally cognizable only by a three-judge district court. The district judge, on whose docket the application appeared, denied and dismissed it on this ground, holding that he was without jurisdiction to grant relief.

In making such dismissal, the trial court was in error. Where an application for an injunction is made, which, under 28 U.S.C.A. § 2281, can only be granted by a three-judge court, it is the duty of the district judge to whom it is presented, under § 2284 (1), to "notify the chief judge of the circuit, who shall designate two other judges * * *". There is no requirement in § 2284 that the applicant for the injunction must determine the need for a three-judge court and make request therefor, and no provision that, if this is not done, there is a lack of judicial jurisdiction. The practical, expediting and procedural nature of the statute suggests to the contrary that the legislative intention was that the district judge to whom an application for an injunction is presented must exercise the responsibility not only of determining whether it is in fact a three-judge case or a single-judge matter but also of taking the necessary action on this basis for enabling the case to be disposed of on its merits. If the case is a three-judge matter, he must make request of the Chief Judge of the Circuit for the constituting of such a court. He may not dismiss. We have expressly held that "a case which requires a three-judge court for any disposition of it on its merits * * * may not * * * over the objection of the plaintiff, be dismissed by a single judge". Snyder's Drug Stores v. Taylor, 8 Cir., 227 F.2d 162, 165.

But here the error of the trial court in making dismissal was more fundamental than this, for the injunction which appellants sought was not in fact one which required a three-judge court for its issuance. The relief sought was not predicated, nor did it turn, upon any Arkansas statute or statutes being declared to be unconstitutional.

[*Three-Judge Court*]

28 U.S.C.A. § 2281, imposing the prescription for a three-judge court as to injunctions related to state statutes, provides: "An interlocutory or permanent injunction restraining the enforcement or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof *upon the ground of the unconstitutionality of such statute* unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title". (Emphasis supplied.)

Appellants' application for an injunction did not challenge in any way, for purposes of the present case, the constitutionality of Acts Nos. 4 and 5, or § 80-518, supra—the only Arkansas statutes which are involved in the situation here. Nor does our holding, that the facts, as they have been admitted to exist, entitle appellants to an injunction as a matter of law, deal in any way with the constitutionality as such of these statutes. The propriety and legality of appellees' acts and threatened actions have been viewed simply in relation to the obligation imposed upon them by the previously existing federal court decree, without regard to whether the statutes mentioned are in themselves constitutional or unconstitutional. The only direct observation which we have made in relation to these statutes was to note that what appellees had done did not even represent acts purporting to be required of appellees by the statutes but constituted legally voluntary action on their part.

Only where it is necessary to hold a state statute unconstitutional, if the action taken by a state officer thereunder or an order issued by an administrative agency pursuant thereto is to be capable of being enjoined, does § 2281 require a three-judge court. Acts of state officials, which otherwise constitute a violation of federal law, or which are on other federal grounds legally improper, in their relation to a particular

situation, may afford the basis for an injunction without regard to the validity of the state statute underlying them. A three-judge district court is not required for the issuance of such injunction.

Thus, the Supreme Court has pointed out that, within the purview of the three-judge statute, an attempt to reach the unconstitutionality of the result obtained by the use of a state statute, without challenge against or required consideration of the validity of the statute itself, must be distinguished from an attack upon the constitutionality of the statute. Ex parte Bransford, 310 U.S. 354, 361, 60 S.Ct. 947, 84 L.Ed. 1249. See also Phillips v. United States, 312 U.S. 246, 252-253, 61 S.Ct. 480, 85 L.Ed. 800; Faubus v. United States, 8 Cir., 254 F.2d 797, 805.

[*Unconstitutional Result*]

Here the acts in which appellees engaged under the Arkansas statutes would involve a contributing to an unconstitutional result against appellants. Their action in executing a lease to the Private School Corporation was in the circumstances an attempt to provide the necessary buildings, equipment and other operational facilities of the Little Rock public schools for the maintenance of a private segregated high school system, to take the place and serve the purpose of the schools under integration edict, which the Governor had closed. Appellees also were agreeing to keep the property in condition so that the segregated school operation could be continued. They further participated in an arrangement to help the Corporation obtain teachers with which to be able to carry on the operation, by agreeing to allow the high school teachers of the District to contract to serve in the segregated system, without prejudice to their status as employees of the District, and by exercising their official power to guarantee such teachers in their segregated school service a right of return "to his or her previous status including salary and classification on the day immediately following his or her termination with the Little Rock Private School Corporation". And they did these things knowing that the purpose which they would thus be serving and the intention which underlay them on the part of those seeking to induce them to take the action was to enable the Private School Corporation to receive funds from the State with which to carry on the segregated school operations.

What the Supreme Court said in Cooper v. Aaron, 78 S.Ct. at page 1410, may for emphasis be repeated here: "State support of segregated schools through any arrangement, management, funds or property cannot be squared with the (Fourteenth) Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws".

But apart from the unconstitutionality of the result as such, which these acts of appellees would serve to effect, there is more concretely involved the fact, which we have stressed above, that what appellees have done and threatened to do is improper and unlawful as being violative of the decree against them. Not only would such action be inconsonant with the obligation of the decree but it would also directly complicate, impede, and contribute to the thwarting or frustrating of the execution of the decree and the accomplishment of the integration mandated thereunder.

[*Appellants Injured*]

It further would contribute to depriving appellants of their benefit—in the disruption occasioned to their enjoyment of the right of desegregated school attendance, of which they had come into possession during the preceding school year—of such public pressure as would normally otherwise arise and be likely to constitute a substantial factor against any sustained closing of the high schools of the District. The irreparableness of the injury done by any act which contributes to keeping public schools closed is, we think, apparent.

Finally appellees argue, as they have done in the previous incidents of administration and litigation which have occurred in the Little Rock school situation, that they are "in a position of neutrality", and so should be treated as being "but nominal parties to this proceeding", with the Private School Corporation being regarded as an indispensable party to any injunction consideration.

The District Court, this Court, and the Supreme Court have all recognized the previous good faith of appellees. But what they have now done and threatened to do can hardly legally be viewed as a matter of neutrality in relation to the court decree against them. Complicating, impeding and assisting to effect a frustration of the execution of the decree cannot be termed legal neutrality. Nor could a position of neutrality continuingly serve to satisfy appellees' obligation under the decree. They are

under mandate, as the agency through which the State has committed the constitutional violation existing in the Little Rock School District, to move forward to correct that violation, by carrying out the integration plan. Implicit in this mandate of moving forward to carry out the plan necessarily is a reasonable exercising by them of such legal powers as they possess, to try to achieve that integration.

Clearly, they are entitled to be stopped from taking any contemplated step in the opposite direction—and especially so where those steps are legally voluntary on their part, as they are here. And it does not require the presence of any other party in order to be able to stop them from taking any such contemplated step. We could not, of course, formally adjudicate the invalidity, so as to decree cancellation, of the lease instrument which has been made, in the absence of the Little Rock Private School Corporation as a party. But the presence of the Corporation is not needed to put appellees under injunction to prevent them from taking any further steps violative of the decree against them.

[*Right to Intervene*]

If the Private School Corporation believes itself possessed, on what has occurred, of a legal right to have the buildings, equipment and teaching facilities of the Little Rock high schools turned over to it, for operating a segregated high school system, as a means of filling the educational gap created in the community by the closing of such schools to prevent integration, it is at liberty to intervene in the District Court, within 10 days after the issuance of our mandate, and seek a formal determination of that question, within the apparent intendment of the provision of the lease that "this lease shall terminate immediately and be held for naught in the event it is determined improper or invalid by final judgment of a court of competent jurisdiction".

The briefs of appellants and of the Government as amicus curiae have set out and discussed the line of cases in which lessees of public property have in the circumstances of the particular situation involved, on the theory of state instrumentality, have been held to be subject to the obligation of the State against racial discrimination. See Derrington v. Plummer, 5 Cir., 240 F.2d 922; Dept of Conservation & Development v. Tate, 4 Cir., 231 F.2d 615; Kerr v. Enoch Pratt Free Library of Baltimore City, 4 Cir., 149 F.2d 212; Lawrence v. Hancock, D.C. S.D. W. Va., 76 F.Supp. 1004. Similarly, cases in other areas in which State action has been pierced and found to represent a stratagem or device resorted to for purposes of preserving racial discrimination have also been referred to in the briefs. See Terry v. Adams, 345 U.S. 461, 73 S.Ct 809, 97 L.Ed. 1152; Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987; Perry v. Cyphers, 5 Cir., 186 F.2d 608; Rice v. Elmore, 4 Cir., 165 F.2d 367.

The effect of all these cases, in their relation to the present situation has been epitomized by the Supreme Court in Cooper v. Aaron, 78 S.Ct. 1401, 1409, as follows: "In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly or directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously' ".

But we do not now assume to deal with the significance of these holdings and expressions in relation to the present situation, at least not beyond the acts and contemplated actions of the School Board, since these alone are adjudicatorily before us.

[*Order Vacated*]

The order of the District Court dismissing appellants' application for an injunction is hereby vacated; and the cause is remanded to that Court with directions to enter an order of injunction against appellees, enjoining them from taking any further steps or action, without the approval of the District Court, to transfer possession, control or operation, whether directly or indirectly, of any of the senior high schools or any other property or facilities of the Little Rock School District, to any organization or person, for carrying on any segregated school operations of any nature; enjoining them also from engaging in any other acts, whether independently or in participation with anyone else, which are capable of serving to impede, thwart or frustrate the execution of the integration plan mandated against them; and further providing that they shall take such affirmative steps as the District Court may hereafter direct,

to facilitate and accomplish in accordance with the Court's prior orders.[3]

The order herein directed shall also be made to run and have application to the successors of appellees; and the officers, agents, servants, employees and attorneys of appellees and of their successors; and all persons in active concert or participation with appellees or with their successors.

The preliminary or interlocutory injunction issued herein shall stand and remain in effect, until the injunction herein ordered shall have been entered by the District Court and become effective.

Judgment vacated and cause remanded for entry of order of injunction as herein directed; and preliminary injunction issued herein continued in effect until entry of injunction ordered in the District Court.

3. It is of course not the intention of this provision of our order that appellees shall take only such affirmative steps to carry out the integration plan as the District Court may expressly direct. Appellees have an obligation under the previous general order against them to move forward, within their official powers, to carry out the integration plan, to which they must commensurately respond on their own initiative.

EDUCATION
Public Schools—North Carolina

Helen COVINGTON et al. v. J. S. EDWARDS, Superintendent of Schools of Montgomery County, North Carolina, et al.

United States District Court, Middle District, North Carolina, Rockingham Division, September 12, 1958, 165 F.Supp. 957.

SUMMARY: A class action was brought in federal district court in 1955 against officials of the Montgomery County, North Carolina, public schools to secure admission of Negroes to schools without regard to race or color. Plaintiffs' motion for a three-judge court to try the case was denied on the ground that the constitutionality of a state statute was not in issue because the *School Segregation Cases* had already rendered state constitutions and statutes requiring racial segregation in public schools unconstitutional. 139 F.Supp. 161, 1 Race Rel. L. Rep. 516 (M.D. N.C. 1956). Plaintiffs, in September, 1956, moved for leave to file an amendment and supplemental complaint challenging the constitutionality of certain state school laws known as the "Pearsall Plan", which had been enacted in July, 1956. [See 1 Race Rel. L. Rep. 581, 928-940 (1956)]. Plaintiff contended that exhaustion of administrative remedies under state law was unnecessary because the time-lapse since the *School Segregation Cases* without desegregation action by defendant overcame the presumption that school officials "will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids." Noting that the Supreme Court had not required integration but had only declared that states may not deny admission of persons to schools on racial grounds, the court held that the presumption had not been overcome as to this defendant. For failure to allege the exhaustion of administrative remedies, the action was dismissed.

STANLEY, District Judge:

The complaint in this action was filed on July 29, 1955, as a class action by thirteen adult plaintiffs personally and as next friend of forty-five minor plaintiffs, on behalf of themselves and all other citizens and residents of Montgomery County, North Carolina, similarly situated. Named as defendants are the Superintendent of Schools of Montgomery County, North Carolina, and the individual members of the Montgomery County Board of Education.

In their complaint, plaintiffs asked (1) that a three-judge court be convened, (2) that interlocutory and permanent judgments be entered "declaring that Article IX, Section 2, of the North Carolina Constitution, and any customs, practices and usages pursuant to which plain-

tiffs are segregated in their schooling because of race, violate the Fourteenth Amendment to the United States Constitution", and (3) that interlocutory and permanent injunctions issue "ordering defendants to promptly present a plan of desegregation to this court which will expeditiously desegregate the schools in Montgomery County and forever restraining and enjoining defendants and each of them from thereafter requiring these plaintiffs and all other Negroes of public school age to attend or not to attend public schools in Montgomery County because of race."

Plaintiffs were allowed to amend their complaint on August 12, 1955, but without changing the nature of their cause of action. Thereafter, an order was signed denying plaintiffs' motion for a three-judge court. D.C., 139 F. Supp. 161.

After receiving an extension of time within which to answer, the defendants filed their answer on September 12, 1955, alleging failure to exhaust administrative remedies and lack of good faith on the part of the plaintiffs in bringing the action. Upon motion of plaintiffs, a portion of the answer charging plaintiffs with lack of good faith was stricken.

Thereafter, plaintiffs filed a motion to amend their complaint to allege that defendants are officers of the State of North Carolina, enforcing and executing state statutes and policies. After a hearing on this motion, an order was entered by the court on December 16, 1955, allowing the amendment.

On February 23, 1956, plaintiffs petitioned the court to reconsider its order denying their motion for a three-judge court. This motion was again denied in an opinion rendered by Judge Johnson J. Hayes on April 6, 1956. Covington v. Montgomery County School Board, D.C.M.D.N.C.1956, 139 F.Supp. 161.

[*Supplemental Complaint*]

On September 13, 1956, plaintiffs filed a motion for leave to file amended and supplemental complaint and to add parties defendant. In the supplemental complaint, plaintiffs seek to test the constitutionality of certain state school laws, commonly known and referred to as the "Pearsall Plan", and seek to make the members of the State Board of Education and the Superintendent of Public Instruction of the State of North Carolina parties defendant. Thereafter, the Attorney General of the State of North Carolina made a special appearance on behalf of members of the Board of Education and the State Superintendent of Public Instruction in opposition to plaintiffs' motion, and the defendants filed a motion to dismiss the complaint for failure to state a claim on which relief could be granted, and for failure to prosecute.

A hearing on pending motions was held on March 26, 1958, at which time the Court ordered the parties to file briefs setting forth their legal contentions on all issues raised by the pleadings and the pending motions. The Attorney General of the State of North Carolina was directed to file a brief with the court with respect to his position on all the issues raised in the pleadings.

[*Principal Questions Involved*]

The principal questions now before the court for determination are (1) whether the complaint, or proposed amended and supplemental complaint, states a claim against the defendants on which relief can be granted, and (2) whether the members of the State Board of Education and the State Superintendent of Public Instruction are necessary and proper parties to the action.

The decision that has been reached on the first question makes a determination of the second question unnecessary for disposition of this case. However, in regard to the second question, this court has today rendered an opinion in another case, Jeffers v. Whitley, D.C.M.D.N.C. 1958, 165 F.Supp. 951, in which it was held that the members of the State Board of Education and the State Superintendent of Public Instruction are neither necessary nor proper parties in actions of this type.

In regard to the first issue, it should be stated at the outset that the plaintiffs have not alleged in either their original complaint, or in their proposed amended and supplemental complaint, that there has been any exhaustion of their administrative remedies as provided for in Sec. 115-176 through 115-178, General Statutes of North Carolina, known as the Enrollment and Assignment of Pupils Act. Indeed, in their brief, plaintiffs admit that they did not proceed under this act, and contend that exhaustion of administrative remedies provided for by the act are unnecessary.

Counsel for the plaintiffs make this contention in face of the decisions rendered by the Court of Appeals for this circuit in Carson v. Board

of Education of McDowell County, 4 Cir., 1955, 227 F.2d 789 and Carson v. Warlick, 4 Cir., 238 F.2d 724, 728, certiorari denied 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed.2d 664.

They advance the argument that the presumption relied on in Carson v. Warlick, supra, that school officials "will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids" is not valid because of the length of time that has passed since the decision of the Supreme Court of the United States in Brown v. Board of Education of Topeka, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, without the defendant's acting to desegregate the public schools of Montgomery County. The fallacy of this argument is readily seen when one reflects on what the Supreme Court actually held in the Brown case. As has been repeatedly stated, the Brown case does not require integration, but only holds that states can no longer deny to any one the right to attend a school of their choice on account of race or color. Briggs v. Elliott, D.C.E.D.S.C. 1955, 132 F.Supp. 776; Thompson v. County School Board of Arlington County, D.C.E.D. Va.1956, 144 F.Supp. 239; School Board of City of Newport News, Va. v. Atkins, 4 Cir., 1957, 246 F.2d 325.

Counsel for plaintiffs further contend that even if the Assignment and Enrollment of Pupils Act is constitutional, it need not be complied with in this case because the provisions of the act are being unconstitutionally applied. This argument is completely untenable in view of the fact that there is no allegation that any of the plaintiffs ever sought to comply with the provisions of the act. Not until each of the plaintiffs has applied to the Board of Education of Montgomery County as individuals, and not as a class, for reassignment, and have failed to be given the relief sought, should the courts be asked to interfere in school administration. Carson v. Warlick, supra.

The requirement for plaintiffs in suits of this type to exhaust administrative remedies before seeking injunctive relief in the federal courts is discussed at some length in the case of Holt v. Raleigh City Board of Education, D.C.M.D. N.C. 1958, 164 F.Supp. 853. Reference is made to that case for further discussion of my views on this subject.

In view of the plain holding of the Court of Appeals for this circuit in the Carson cases, and in view of the fact that the plaintiffs do not allege that they have exhausted, or have even attempted to exhaust, their administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act, I conclude that the plaintiffs have failed to state a claim against the defendants, in either their original complaint or their proposed amended and supplemental complaint, on which relief can be granted, and that this action should be dismissed.

A judgment will be entered in conformity with this opinion.

EDUCATION
Public Schools—North Carolina

Mimia JEFFERS and Allene Jeffers, Minors, by John L. Jeffers, their Father and Next Friend, et al. v. Thomas H. WHITLEY, Superintendent of the Public Schools of Caswell County, et al.

United States District Court, Middle District, North Carolina, Greensboro Division, September 12, 1958, 165 F.Supp. 951.

SUMMARY: A class action in behalf of forty-three school children was brought in federal district court against school officials of Caswell County, North Carolina, and against the State Superintendent of Public Instruction and the State Board of Education. Plaintiffs sought to have enjoined the enforcement of certain provisions of the state constitution and statutes alleged to be contrary to the Fourteenth Amendment, and to procure an order re-

quiring prompt presentation of an expeditious school desegregation plan for the county. The state officials moved for dismissal of the action as to themselves, on the ground that they have no authority over pupil assignment. The court found that, under state law, state education officials had been given broad general powers but that the specific authority to assign and enroll pupils has been vested in county and city boards of education. Since plaintiffs, if successful in this action, would be entitled to complete relief against defendant county officials, the court concluded that defendant state officials were neither indispensable nor necessary parties and dismissed the action against the latter defendants.

STANLEY, District Judge:

This action was commenced on December 10, 1956, by twenty-three adult plaintiffs, individually and as parents and next friends of forty-three minor plaintiffs, on behalf of themselves and all other citizens and residents of Caswell County, North Carolina, similarly situated, against the Superintendent of Public Schools of Caswell County, the individual members of the School Board of Caswell County, the State Superintendent of Public Instruction, and the individual members of the State Board of Education.

[*The Complaint*]

It is alleged in the complaint that the minor plaintiffs are citizens and residents of Caswell County, North Carolina, and eligible to attend the public schools of said county; that the Superintendent of Public Schools and members of the School Board of Caswell County maintain and generally supervise the public schools of Caswell County; that said schools are being operated on a segregated basis, pursuant to the direction and authority of the State Constitution, State Statutes, and State administrative orders and legislative policy; that the defendants, State Superintendent of Public Instruction and State Board of Education, are charged with the general supervision and administration of the public schools of North Carolina; that on August 6, 1956, the plaintiffs petitioned the Board of Education of Caswell County to abolish segregation in the schools of Caswell County, which was refused; that on September 10, 1956, the plaintiffs appealed to the State Board of Education and the State Superintendent of Public Instruction to order the Caswell County Board of Education to desegregate the schools within its jurisdiction, which was refused; and that at its regular 1955 session and at a special session held in 1956, the General Assembly of North Carolina amended and rewrote the State Public School Laws, which amendments had as their singular and sole purpose and effect the continuation of racial segregation in the public schools of this state. The plaintiffs pray (1) that a three-judge court be convened, (2) that a temporary injunction be entered restraining the defendants from enforcing certain provisions of the State Constitution and General Statutes whereby the plaintiffs are denied equal protection of the laws secured to them by the Fourteenth Amendment to the Constitution of the United States, and (3) that the court issue interlocutory and permanent injunctions ordering defendants to promptly present a plan of desegregation to the court which will expeditiously desegregate the schools of Caswell County.

[*The Answer*]

Thereafter, on January 14, 1957, the members of the Caswell County Board of Education and the Superintendent of Schools of Caswell County filed an answer denying most of the material allegations of the complaint and asserting as an affirmative defense that the plaintiffs had not, prior to the institution of the suit, exhausted their administrative remedies before the Board of Education of Caswell County, in accordance with the procedures prescribed by North Carolina statutes dealing with assignment of pupils to public schools. The answer of said defendants further alleged that neither the State Board of Education nor the State Superintendent of Public Instruction has any authority or control whatever over the assignment of pupils to public schools is Caswell County or any other county in the state, and that the Caswell County Board of Education has the sole authority over the assignment or reassignment of any and all pupils to the public schools of Caswell County.

On January 15, 1957, the State Board of Education and the State Superintendent of Public Instruction filed an answer denying most of the material allegations in the complaint, and setting up an affirmative defense that the plaintiffs

did not, prior to the institution of this action, exhaust their administrative remedies before the Board of Education of Caswell County in accordance with the procedures prescribed by the North Carolina statutes dealing with assignment of pupils to the public schools. Said defendants further alleged that neither the State Board of Education nor the State Superintendent of Public Instruction has any authority whatever over assignment of pupils in public schools in Caswell or any other county in the state, and that the Caswell County Board of Education has the sole authority and complete control over the assignment and reassignment of pupils to the public schools in Caswell County. As exhibits, said defendants attached to their answer a letter addressed to the State Superintendent of Public Instruction, dated September 10, 1956, by certain of the plaintiffs, requesting that he order the Caswell County Board of Education to reorganize the Caswell County School system on a non-segregated basis, and the reply of the State Superintendent of Public Instruction, dated September 14, 1956, advising that under the public school laws of North Carolina the authority for assigning children to public schools is vested solely in local boards of education.

[*Supplemental Complaint*]

On February 10, 1958, the plaintiffs filed a motion for leave to file a supplemental complaint alleging that the plaintiffs and each of them individually on or about May 1, 1957, wrote letters to the School Board of Caswell County protesting the reassignment of their children to a segregated school system and requesting that the school board operate the public schools of said county on a non-segregated basis; that no assignment of pupils was made by the School Board of Caswell County until July 16, 1957, at which time the plaintiffs were assigned to schools which had theretofore been operated for the exclusive use of Negroes, and the white pupils were assigned to schools that had theretofore been operated exclusively for white children; that on July 16, 1957, the plaintiffs filed a petition with the Caswell County School Board requesting reassignment of their children to a non-segregated school; that this request was made pursuant to the requirements of Sec. 115-178, General Statutes of North Carolina; that on August 22, 1957, the Caswell County School Board denied the plaintiffs their request for reassignment; that in apt time each of the plaintiffs applied for a rehearing on their request for reassignment; that at the time set for rehearing, the plaintiffs' requests for reassignment to a non-segregated school were again denied; that on October 8, 1957, the plaintiffs requested the State Superintendent of Public Instruction, who is also the Secretary of the State Board of Education, to advise the Caswell County School Board to reassign the plaintiffs to schools in districts nearest their homes on a non-segregated basis; that said Superintendent of Public Instruction, by letter dated October 18, 1957, informed the plaintiffs that he had no authority over such requests and denied same; that plaintiffs have exhausted all administrative remedies as required by the pupil assignment law, and more particularly the requirements of Sec. 115-178 and Sec. 115-179, General Statutes of North Carolina, without having obtained the relief sought.

[*Motion to Dismiss*]

On March 17, 1958, the State Board of Education and the State Superintendent of Public Instruction filed a motion to dismiss the action as to said defendants for the reason that the complaint fails to state a claim upon which relief can be granted, and for the further reason that said defendants are not charged with any legal duties under the Constitution and laws of the State of North Carolina relating to the assignment or reassignment of pupils in the public schools of the state. The allegation is further made that said action should be dismissed because of a misjoinder of parties and causes of action.

Oral arguments were thereafter heard on the plaintiffs' motion for leave to file a supplemental complaint, and the motion of the defendants, the State Board of Education and State Superintendent of Public Instruction, to dismiss the action as to them. At the time of oral arguments the parties were requested to file briefs setting forth their legal contentions, which have now been filed.

The matters presently before the court for determination are (1) whether the plaintiffs' motion for leave to file supplemental complaint should be granted and (2) whether the defendants, State Board of Education and State Superintendent of Public Instruction, are indispensable and necessary parties to this action.

I

WHETHER THE PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT SHOULD BE GRANTED.

It is well settled that the plaintiffs must exhaust their administrative remedies provided for under the North Carolina Assignment and Enrollment of Pupils Act, Sec. 115-176 through Sec. 115-179, General Statutes of North Carolina, before applying to the federal courts for injunctive relief. Carson v. Board of Education of McDowell County, 4 Cir., 1955, 227 F.2d 789, and Carson v. Warlick, 4 Cir., 238 F.2d 724, certiorari denied 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed.2d 664. Indeed, it would appear that the plaintiffs have recognized their responsibility to comply with the provisions of the state law relating to the enrollment and assignment of pupils in public schools by seeking leave to file a supplemental complaint in which it is alleged that they have exhausted their administrative remedies.

Based on the allegation in the plaintiffs' proposed supplemental complaint that plaintiffs "have exhausted all administrative remedies, as required by the pupil assignment law, and more particularly the requirements of the North Carolina General Statutes 115-178 and 115-179 without having obtained the relief sought," and without passing on the question as to whether or not the plaintiffs have in fact adequately exhausted their administrative remedies under these laws, it is concluded that the plaintiffs' motion for leave to file supplemental complaint should be granted.

II

WHETHER THE DEFENDANTS, STATE BOARD OF EDUCATION AND STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, ARE INDISPENSABLE AND NECESSARY PARTIES TO THIS ACTION.

In passing on the question of whether or not the State Board of Education and the State Superintendent of Public Instruction (hereinafter referred to as the "State Officials") are indispensable and necessary parties to this action, we must look to the allegations of the original complaint and the proposed supplemental complaint, including the nature of relief sought, and the public school laws of the State of North Carolina, of which we must take judicial notice, to determine if any decree granting the relief sought will require the state officials to take action by exercising any power lodged in them, or if the relief can be effectively granted by a decree operating against the Superintendent of Schools of Caswell County and the Board of Education of Caswell County (hereinafter referred to as the "County Officials"). If the relief sought can be decreed without requiring the state officials to take positive action under some duty or power conferred upon them by state law, it would follow that they are neither indispensable nor necessary parties. For a general discussion of these principles, see Barron and Holtzoff on Federal Practice and Procedure, Volume 2, Sections 514 and 515, and the authorities therein cited.

The primary allegations against the state officials are that they are charged with the general supervision and administration of the public schools of North Carolina and that plaintiffs asked them to issue an order to the county officials to desegregate the schools in Caswell County, which was refused. In this connection, it must be borne in mind that both the county officials and the state officials set up in their answer that the state officials have no authority whatever over the assignment of pupils in public schools in Caswell County, or any other county in the state, and that the county officials have the sole authority over the assignment and reassignment of any and all pupils to the public schools of Caswell County.

[*State Public School Laws*]

The public school laws of this state are found in Chapter 115, General Statutes of North Carolina. No attempt will be made here to summarize all of these laws. It is sufficient to point out that Section 115-2 vests the general supervision and administration of the free public school system in North Carolina in the State Board of Education; that Section 115-11 defines the general powers and duties of the State Board of Education; that Sections 115-12 through 115-15 define the general powers and duties of the State Superintendent of Public Instruction; that Sections 115-18 through 115-53 provide for the manner of election and the powers and duties of County and City Boards of Education; that Sections 115-54 through 115-68 define the powers and duties of the Superintendents of City and County Schools; and that Sections 115-176 through 115-179 relate to the assignment and enrollment of pupils in the public schools of this state.

While the state officials are given broad general powers over the public school system, specific authority for the assignment and enrollment of pupils in all city and county administrative units throughout the state is vested solely in county and city boards of education. Section 115-176, General Statutes of North Carolina, provides, in part, as follows:

> "Each county and city board of education is hereby authorized and directed to provide for the assignment to a public school of each child residing within the administrative unit who is qualified under the laws of this State for admission to a public school. * * * No child shall be enrolled in or permitted to attend any public school other than the public school to which the child has been assigned by the appropriate board of education."

[*Assignment Procedure*]

Section 115-177 requires each county and city board, in making assignment of pupils, to give individual written notice of assignment, either on each pupil's report card or any other feasible means, and Section 115-178 sets up the procedure for making applications for reassignment, notice of action taken, and hearings before the board. The sole authority for proceeding under Section 115-178 is vested in local boards.

While the complaint contains general allegations that the county officials are denying the plaintiffs their constitutional rights pursuant to direction and authority of state statutes, state administrative orders and legislative policy, it is nowhere alleged that the state officials have any specific authority or control over county officials in regard to the enrollment and assignment of pupils. Indeed, it is alleged in Paragraph 5(a) of the original complaint that the county officials *maintain and generally supervise* the public schools of Caswell County.

After an exhaustive search of the public school laws of this state, I fail to find any provision giving the state officials any authority or control whatever over local school officials relating to the enrollment and assignment of pupils in the public schools.

While at its regular session in 1955 and at a special session in 1956, the General Assembly of North Carolina amended, renumbered, rearranged and rewrote Chapter 115 of the General Statutes, which is the basic school law of the State, and repealed certain obsolete sections, the basic plan of the public school system has not been changed, except that local units, which actually administer and control the system, have been given more authority.

The entire subject was exhaustively treated by Judge Johnson J. Hayes in the case of Blue v. Durham Public School Dist., D.C.M.D.N.C., 1951, 95 F.Supp. 441, 443. In this case, the State Board of Education and the State Superintendent of Public Instruction, having been made parties defendant, filed a motion to dismiss on the general ground that they had no control over the furnishing of school facilities and owed no duties to the plaintiffs. In dismissing the action against the state officials, Judge Hayes, after reviewing the various school laws of North Carolina, and the powers vested in state and local officials, said:

> "It appears from the foregoing statutes that the State officials are given broad general powers over the public school system which must be construed in connection with statutes which confer specific authority on local officials. The decisions of the North Carolina Supreme Court have consistently upheld the powers of the local authorities. * * * The mere discretionary powers of the state officials are not to be controlled by injunctive power of the court. It follows that the action against the state officials must be dismissed."

To the same general effect is Constantian v. Anson County, 1956, 244 N.C. 221, 93 S.E.2d 163, where the Supreme Court of North Carolina said:

> "Full responsibility for the administration of school affairs and the instruction of children within each administrative unit, including the assignment of pupils to particular schools, rests upon the school authorities of such units."

[*Indispensable Parties?*]

The plaintiffs in their brief simply refer to the general broad powers given to state officials under the public school laws, make reference to a speech made by the Governor of North Carolina in 1956 regarding assistance given to local school boards by certain state officials in the preparation of rules and regulations pursuant to the pupil assignment law, and complain

that city and county school boards are maintaining segregated schools in the furtherance of an established state policy, but fail to cite any authority in support of their contention that the state officials are indispensable and necessary parties to the action.

In passing, it might be well to note that the North Carolina Supreme Court, in Constantian v. Anson County, supra, acknowledges that the decisions of the Supreme Court in Brown v. Board of Education of Topeka, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and Brown v. Board of Education, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, are authoritative in this jurisdiction, and that "* * * any provision of the Constitution or statutes of North Carolina in conflict therewith must be deemed invalid." The Attorney General of the State of North Carolina acknowledges in his brief that local school officials in enrolling and assigning pupils to the public schools of North Carolina must treat all pupils alike and that "color has been abolished as any basis for segregation in the public schools of this State."

If there should be any state laws or constitutional provisions under which the state officials are attempting to exercise any authority or control whatever over local school boards in the enrollment and assignment of pupils in contravention of their constitutional rights, it is too well settled to admit of argument that, as was stated by Judge Hayes in Covington v. Montgomery County School Board, D.C.M.D. N.C. 1956, 139 F.Supp. 161, 163, "* * * it follows as the night the day that, being in conflict with the Constitution of the United States as defined by the Supreme Court, they are to that extent, null and void."

It is concluded that the state officials have no control or authority whatever over the enrollment and assignment of pupils in the public schools of North Carolina, and that the plaintiffs, if they prevail in this action, are entitled to obtain complete relief against the county officials, and that this action should be dismissed against the state officials.

A decree will be entered accordingly.

EDUCATION
Public Schools—Oklahoma

Thurman BROWN, Jr., etc., Minors, by their father and next friend, Thurman Brown, Sr., et al., Plaintiffs, Edward J. Dalcour, a Minor, by his father and next friend, George Dalcour, Applicant for Intervention v. W. E. (Bill) LONG, As President, and Mrs. Edith Wilson, As Secretary, of the Morris Independent School District, and the Morris Independent School District No. 3, a Corporation.

United States District Court, Eastern District, Oklahoma, October 10, 1958, Civ. No. 4245.

SUMMARY: A declaratory judgment and an injunction were sought in federal district court by certain Negro school children of Morris, Oklahoma, in September, 1957, to require their admission to public schools without regard to race or color. Counsel agreed that the rights of those plaintiffs who had already entered other schools for the current year presented an administrative matter to be determined by school authorities. The court declared the right of the other plaintiffs to attend defendants' school without discrimination but declined to issue an injunction. ———F.Supp.———, 3 Race Rel. L. Rep. 11 (1957). In August, 1958, a Negro child, resident of an adjacent school district, filed an intervening petition for an order requiring defendant school officials to admit him to a high school operated by them. The court found that there was no high school in the district where intervenor lived; that except for intervenor, recent applications of elementary school graduates of that district to transfer to the high school operated by defendants had been accepted; and that there was a "very strong inference" that the race and color of intervenor was the principal reason for the protest of his transfer application. Subsequently, intervenor had successfully applied for trans-

fer to a segregated Negro high school. The court entered judgment for defendants because intervenor had failed to observe a statutory procedure for state court review of adverse decisions by local school officials upon applications for transfers between school districts. Further, intervenor's action in transferring to another district after defendants denied him a transfer created an administrative problem under the transfer laws that a federal district court is not obliged to supervise.

RICE, District Judge:

FINDINGS OF FACT

1. Plaintiffs filed the original action herein on March 14, 1957. The judgment and decree was entered and filed on September 21, 1957.

2. On August 25, 1958, Edward J. Dalcour, a minor, by his father and next friend, George Dalcour, filed an intervening petition seeking an order of this court directing the officials of the Morris Independent School District to admit him as a student in said school. The intervening petitioner will hereafter be referred to as plaintiff.

3. Plaintiff is a citizen of the United States and of the State of Oklahoma; he lives in Okmulgee County and resides within the Eram Dependent School District, which district is adjacent to the defendant district. Plaintiff is a member of the Negro race; he is a minor and of public school age.

4. The defendant, W. E. (Bill) Long is the duly elected qualified and acting president of the Board of Trustees of the Morris Independent School District and Mrs. Edith Wilson is secretary of said district and were such duly elected members and officials of the Morris Independent School District No. 3, Okmulgee County, Oklahoma, at the time this intervening petition was filed.

5. The Eram School District maintains only an elementary school course, and the plaintiff has completed the school program as offered by the said Eram District. It is therefore necessary that pupils completing the elementary school course in the Eram school must complete their high school education in other school district maintaining high school programs.

6. For the past three years, the Morris Independent School District has accepted transfer applications of all of the graduates of the Eram School District, with the exception of the aplication of the plaintiff. The Morris Independent School District sends its bus or buses into the Eram School District and picks up and conveys those students who have transferred to the Morris Independent School District to said high school, and only those who have transferred to said district.

7. Plaintiff made timely application for transfer to the Morris High School during the spring of 1958 and before the 15th day of May, 1958; the Morris Board of Trustees protested his application and transfer. The County Superintendent sustained the protest and denied the transfer and advised the plaintiff and the respective school districts involved of his action.

8. Plaintiff took no further action in regard to the denial of the transfer. He thereafter applied for transfer to the Hoffman School District, which application was duly approved, and said plaintiff duly enrolled as a student in the Grayson high school for the school year 1958-59.

9. The Hoffman Independent School District, in Okmulgee County, maintains Grayson high school, a segregated colored school, and the Morris Independent School District maintains transportation facilities, passing immediately in front of the home of plaintiff, for transportation of pupils desirous of attending the Grayson high school in the Hoffman School District.

10. The Morris Independent School District maintains and operates a high school and offers the grade which the plaintiff is entitled to pursue. The plaintiff maintains that his transfer application was protested by the defendant school board because of his race and color. The school board did not admit that the protest was because of the race and color of the plaintiff; however, there is a very strong inference that the race and color of the plaintiff was the principal reason for the protest.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter and of the parties involved.

2. In the original action herein, all plaintiffs were residents of the Morris Independent School

District. The Court entered an order directing that those who had not prior to the trial transferred to another district were eligible to be enrolled in the Morris School District and did not enter such an order with respect to those who had transferred to other districts. There is some doubt as to whether or not the plaintiff, Dalcour, is entitled as a matter of right to intervene in this action. The doubt is resolved in favor of intervenor.

3. The intervening petitioner, Dalcour, being a non-resident of the Morris Independent School District, is not, as a matter of right, entitled to attend the Morris school.

4. The legislature of the State of Oklahoma has provided for the transfer of a student from one school district to another school district. The procedure is carefully defined. Title 70, O.S.A., Sec. 8-2 and 3. There is no suggestion that there is one procedure for white children and another for negro children. The application for transfer must be filed with the County Superintendent of the county to which the transfer is desired. The Board of Education of each school district affected is notified. Either district is afforded the right to show cause why the transfer should not be made. From the decision of the County Superintendent, either district, or the parent or guardian of the child seeking a transfer, may appeal to the District Court of the county in which the child resides, and a decision must be rendered not later than June 30.

5. The statutes of the State of Oklahoma do not provide that a child, who attempts to enroll in a school in a district other than the one in which he resides, is entitled to enter any school that he may select and that the board of education of the transferee district has not a right to protest the transfer. Under Oklahoma law before any child, white or colored, may acquire the right to enroll in a school in a district other than the district in which he resides, he must comply with the laws of Oklahoma with reference to a transfer, and a vital part of the transfer law is that he has the right to appeal to the District Court of the county in which he resides in the event the County Superintendent denies the transfer.

6. The important question involved here is whether or not a negro child who applies for a transfer to another district may by-pass an appeal to the State District Court, in the event the County Superintendent denies his transfer, and come direct to the Federal Court for relief. If he may do so, then he is in a better position than the white child who is denied a transfer. Certainly, there is no contention but that a white child, when denied a transfer, must accept the decision of the Superintendent or appeal to the State District Court. This Court concludes that compliance with the state procedure for a transfer is necessary. See Lionel C. Carson, an infant, by his next friend, Martin S. Carson, et als., Appellants, v. Board of Education of McDowell County, a body corporate, Appellee, 227 F.2d 789 (4th Cir.).

7. There is nothing, in my opinion, in the Fourteenth Amendment or in the decision of the Supreme Court in Brown v. Board of Education, 347 U.S. 483, 349 U.S. 294, which requires a contrary decision. As I interpret the decision of the Supreme Court in Brown v. Board of Education, that Court recognizes that the maintenance, management, and control of the public school system is for the State so long as due process of the Fourteenth Amendment is not denied. The Court is of the opinion that the procedural provisions of the law of the State of Oklahoma relating to transfers from one school district to another are applicable to both negro and white children and that a requirement that the procedural provisions be complied with is not a denial of the due process clause of the Fourteenth Amendment.

8. Plaintiff is not entitled to relief for the additional reason that after being denied a transfer to the Morris School District he applied for a transfer to another adjacent district and was granted the transfer, and thereafter enrolled in and attended school in the other district. It is not contemplated by the decision of the Supreme Court that the United States District Courts shall supervise the problems arising under the transfer law relating to schools in Oklahoma.

9. Judgment is entered denying the plaintiff the relief which he seeks and in favor of the defendant.

Dated this the 10th day of October, 1958.

EDUCATION
Public Schools—Oklahoma

Richard Lee JEFFERSON et al., Minors, by their father and next friend, Fee Jefferson v. O. O. McCART, As President, and Charles C. Collins, As an Employee of the Liberty Independent School District No. 9, Okmulgee County, Oklahoma, a Corporation and the Liberty Independent School District No. 9, a Corporation.

United States District Court, Eastern District, Oklahoma, October 10, 1958, Civ. No. 4532.

SUMMARY: At the beginning of the 1958-59 school year, four Negro children were denied admission to an all-white elementary school in Okmulgee County, Oklahoma. In an action to compel admission brought by their father in federal district court, the court found that separate schools for white and Negro pupils had been maintained as the result of voluntary action of patrons, and that there were no present plans for integration. Defendant school officials were directed to admit the four children to the "white" school when they next presented themselves and to be prepared for general integration at the beginning of the 1959-60 term. The court refused an injunction against the Negro principal of the district's all-Negro elementary school to restrain him from attempting to persuade Negro parents to send their children to his school rather than to the previously all-white school.

RICE, District Judge:

FINDINGS OF FACT

1. The Petitioners are negro minors of public school age; they live in Okmulgee County and within the Liberty Independent School District. They are citizens of Oklahoma and of the United States.

2. The Court finds that the defendants were and are the regularly elected members and officials of the Liberty Independent School District No. 9, in Okmulgee County, Oklahoma, at the time this action was commenced.

3. The defendant, Charles C. Collins, is a negro school teacher; he lives in Okmulgee County, Oklahoma, and is the principal of the Anderson Elementary Public School.

4. The Court finds from the evidence that the defendant school district maintains Liberty School for white pupils and Anderson Elementary School for negro pupils; and the high school pupils of the negro race living within the school district attend high school at Grayson high school, a school for Negroes in an adjoining district.

5. The Court further finds that the acts and conduct of the defendant school district in maintaining the school system on a segregated basis has been the result of voluntary action of the residents and patrons of said school system.

6. Plaintiff seeks to enjoin Charles C. Collins, the negro school teacher, and restrain him from doing any act or thing of persuasion or intrigue to prevent the negro parents of school age children from sending or attempting to send their children to the school of their choice within the defendant school district. The defendant Collins admitted that he had advocated the maintenance of the negro school for Negroes, and that he had advocated to the parents in his district that it would be better for their children to attend the negro school rather than to attend the white school. The evidence discloses that there is enmity between the father of the plaintiffs and Charles C. Collins. Prior to the beginning of school this year, there had been no effort or offer on the part of negro children to attend the white school. The parents of the four children, plaintiffs in this action, did not seek enrollment of their children in the Liberty School until enrollment day.

7. The officials of Liberty School have made no plans or arrangement for integration. I think it is fair to say that prior to the effort to enroll the plaintiffs at the beginning of school this year, the officials were justified in believing that the maintenance of the school system of the district on a segregated basis was the result of voluntary action by the residents and patrons of said school systems. The school district officials asked for a reasonable opportunity to make a plan for integration of the school system.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and of the parties involved herein.

2. The request for delay is not justified in view of the fact that the officials stated they would integrate when the Court ordered them to do so. There was an inference that without an order of the Court they would not voluntarily begin integration. It has been more than four years since the opinion of the Supreme Court in Brown v. Board of Education, 347 U.S. 483 and more than three years since the decision in the same case, 349 U.S. 294. The plaintiffs who sought enrollment at the beginning of the term were and are entitled under the law to be enrolled in Liberty School, and the Board is directed to admit them if and when they present themselves for attendance in said school. This order, however, will not require the Board to accept for enrollment during this school year any additional negro children who might apply for enrollment. It is the further order of the Court that the School Board make plans and be prepared for integration at the beginning of the school year in 1959.

3. Plaintiffs are not entitled to any relief as against the defendant Collins. The proof clearly indicates and establishes that the negro school teacher sought to discourage negro children from attending the Liberty School for white children. Collins frankly admitted that he wanted to maintain his school for Negroes. It may be he is motivated by the desire to retain his position as a teacher; however, the proof shows that parents of other negro children want to keep their school and have no desire to send their children to the white school. It is appropriate to observe that neither of the Supreme Court opinions suggest that Oklahoma may not maintain separate schools for negro and white children. There is no mandate that only integrated schools may be maintained. Such a mandate would require Negroes, whether they wanted to or not, to attend a school for both white and negro children and would deprive them of their right to attend a school of their choice. It is not mandatory that negro schools be abolished in Oklahoma. The Supreme Court has said that a state school may not bar a student from a school because of his race or color for the reason that such a bar is a denial of due process of law under the Fourteenth Amendment. The due process clause of the Fourteenth Amendment does not nullify or impair the right of freedom of speech guaranteed by the First Amendment. The defendant Collins, the negro school teacher, violated no right protected by the Fourteenth Amendment in efforts to persuade Negroes to send their children to the negro school. On the other hand, he is fully protected in such efforts by the guarantee of the First Amendment.

A decree in conformity with the foregoing findings of fact and conclusions of law will be entered at Muskogee, Oklahoma, on October 20, 1958, at 9:30 a.m. In the event the attorneys for the respective parties agree upon the form of decree to be entered, the decree may be mailed to the Clerk of the Court and will be entered by the Court within the attendance of the attorneys.

Dated this the 10th day of October, 1958.

EDUCATION
Public Schools—Virginia (Norfolk)

Leola Pearl Beckett, et al. v. The SCHOOL BOARD OF NORFOLK, Virginia, et al.

United States District Court, Eastern District, Virginia, Civ. No. 2214

SUMMARY: In a suit filed in 1956, Negroes in Norfolk, Virginia, sought admission to schools previously classified as white. In early 1957, the federal district court held the Virginia Pupil Placement Act (Ch. 70, Va. Acts of 1956, 1 Race Rel. L. Rep. 1109) unconstitutional, and ordered the defendants to cease refusing, solely on account of race, to admit the plaintiffs to schools classified as white (2 Race Rel. L. Rep. 46, 341). Although the effective date of this order was September, 1957, no further action was taken until June, 1958,

when the district court, Hoffman, J., ordered the school board to act on the Negroes' applications for transfer with "reasonable promptness." The school board then announced plans for a series of tests of prospective transferees, but subsequently reported that all of the applications had been denied. On August 25, Judge Hoffman met with the school board and outlined what the court would consider acceptable criteria for assignment. The school board then announced that 17 Negroes would be assigned to white schools. Materials covering these and other developments in the Norfolk situation are collected at 3 Race Rel. L. Rep. 942-964. The Board's assignments were accepted by the court in a memorandum and order dated September 18, 1958, reproduced below:

HOFFMAN, J.

MEMORANDUM

In lieu of specific findings of fact and conclusions of law, this memorandum is prepared in final determination of matters pending herein, save and except questions involving the validity of the assignment plan promulgated by the School Board of the City of Norfolk requiring all children applying for initial enrollment or transfer into a public school formerly attended solely by students of the opposite race to submit to certain achievement tests and personal interviews.[1] Action upon this latter question is deferred pending receipt of a brief from defendants and possible further argument.

It is unnecessary to relate the history of these proceedings to and including August 29, 1958, as the same is fully documented. See Beckett v. School Board of the City of Norfolk, 148 F.Supp. 430, 2 Race Rel. L. Rep. 46, holding the Pupil Placement Act unconstitutional on its face upon consideration of defendants' motion to dismiss, and 2 Race Rel. L. Rep. 337 (otherwise unreported) determining the merits of the case. The orders entered by this Court, including the ruling upon the constitutionality of the Pupil Placement Act, were appealed to the United States Court of Appeals and affirmed by the latter court, 246 F.(2d) 325. Certiorari was denied by the United States Supreme Court, 355 U.S. 855.

Following the action by the School Board in denying the applications of 151 Negro children for enrollment in, or transfer to, certain schools formerly occupied solely by white children, the Court, after hearing evidence and argument of counsel, convened the members of the School Board in open court and made certain remarks. Counsel for the respective parties agreed that it would be appropriate for the Court to advise the School Board members as to the applicable law, but counsel were not required to agree to the correctness of the legal conclusions as stated by the Court—in fact, counsel neither requested advance information as to the Court's remarks, nor were they advised of same.

The Court's remarks to the School Board members on August 25, 1958, are attached hereto and incorporated herein by reference.

[*Board Submits Report*]

In compliance with the direction of the Court, the School Board submitted and filed a report on August 29, 1958, a copy of which is attached and incorporated herein by reference; the effect of which was to deny the applications of 134 Negro children, and further stating that 17 Negro children "will be assigned to and enrolled in the grades and schools set opposite their names for the school year 1958-'59." Contemporaneous with the filing of said report, the School Board filed a motion to defer, until September, 1959, the enrollment of the 17 Negro children under the assignments set forth in the report of August 29, 1958. By order entered on September 2, 1958, the latter motion was denied; the Court reserving, however, the right to reconsider its action following the argument and determination of the case of Aaron v. Cooper, then pending before the United States Supreme Court on petition for certiorari to the United States Court of Appeals for the Eighth Circuit. On September 12, 1958, the United States Supreme Court affirmed the action of the Eighth Circuit, which latter court had reversed the decision of District Judge Lemley from the Eastern District of Arkansas. There is no longer any legal or justifiable reason further to consider

(1) White children seeking initial enrollment in, or transfer to, a previously all-Negro school would likewise be required to submit to such tests and interviews. Of course, as the resolution is now drawn, if any public school in the City of Norfolk is ever attended by a child of the opposite race, the resolution of the School Board would no longer be applicable as to that school, and tests and interviews would no longer be necessary where the school has already been integrated.

defendants' request for a one year deferment. As long ago as February 12, 1957, the Superintendent of Schools testified that, in his opinion, but for the enactment of certain laws by the General Assembly of Virginia, the City of Norfolk by a process of gradual desegregation could achieve good faith implementation and compliance with the Supreme Court decision without any insurmountable difficulties. More than eighteen months later, immediately following their first step toward good faith compliance and implementation, a delay of an additional year is requested. It is urged that time is required to "educate the adults" as to the problem presented but defendants concede that they are presently powerless to embark upon such an educational program frowned upon by state authorities. Moreover, under state law, the affected schools must be closed by action of the Governor. To grant a delay of one year would only postpone this eventuality. Regrettable though it may be, conditions have not improved in Virginia since the second decision in Brown v. Board of Education rendered on May 31, 1955. In all probability the people of Virginia will ultimately be required to choose between two alternatives, namely, a complete abolition of the public school system throughout the entire State of Virginia, or acceptance in some form and to some extent of the law of the land as interpreted by the United States Supreme Court.

[*Defendants Enjoined*]

By an order of the Circuit Court of the City of Norfolk, Virginia, entered on August 18, 1958, by two Justices of the Supreme Court of Appeals of Virginia, the defendants were enjoined by the state court from assigning or enrolling any children in the public schools of the City of Norfolk. On September 12, 1958, the defendants filed a petition in this Court, together with a motion for temporary injunction, to prevent the state court plaintiffs from interfering further, directly or indirectly, with the final order of this Court heretofore entered on February 26, 1957. An order to show cause was likewise issued against the state court plaintiffs and their attorney. These matters were heard on September 17, 1958, and this Court entered an injunction on September 18, 1958, a copy of said injunction and findings of facts and conclusions of law being attached hereto and incorporated herein by reference. Presumably the School Board will now proceed to make the assignments of the 17 Negro children in accordance with its report of August 29, 1958.

The School Board took and filed certain exceptions to the remarks of the Court submitted to the Board on August 25, 1958. These exceptions must be overruled. At no time did this Court tell the Board that it was required to admit any particular child; nor has the Court assigned any child to any school. Admittedly the Board was faced with a difficult alternative —one being to comply with the law—the other being to subject itself and its members to a possible citation for contempt. The Board elected to comply with the law as interpreted by this Court in light of other decisions. The "racial tension" and "isolated child" factors, as referred to in the Court's remarks of August 25, 1958, are the only general headings under which the Board admitted any Negro children into previously all-white schools. Racial tension as a defense has been effectively disposed of by the decision in Aaron v. Cooper. If the theory of the "isolated child" constitutes just cause for denying the admission of a Negro child, compliance with the law of the land as interpreted by the Supreme Court would never be possible in the southern states. Moreover, the so-called "token integration" has been approved by district and appellate courts sitting in other southern states.

Aside from the validity of the Board's resolution establishing the criteria and procedure with respect to tests and interviews, the plaintiffs and intervenors make only one serious attack upon the correctness of the Court's remarks to the Board on August 25, 1958. This involves the subject of "Too Frequent Transfers" heretofore discussed in the remarks aforesaid. With some variations in mileage not deemed pertinent, the following individual applications of Negro children were considered and rejected by the Board, which action is now approved by the Court. In stating the distances to the various schools, references to Oakwood indicate a previously all-Negro school; to Norview a previously all-white school; and to Rosemont, the new school which will be completed by September, 1959, and to which school the Board has stated that each Negro applicant would be transferred, not because of race or color, at the commencement of the 1959-'60 school year. The following facts are found:

Application of Melvin G. Green, Jr.:
Distance from home to Oakwood 1.4 miles
Distance from home to Norview .3 "
Distance from home to Rosemont .3 "

Application of Glenda Brothers:
Distance from home to Oakwood 1.8 miles
Distance from home to Norview 1.1 "
Distance from home to Rosemont 1.1 "

Applications of Clorateen and Rosa Mae Harris:
Distance from home to Oakwood 1.3 miles
Distance from home to Norview .5 "
Distance from home to Rosemont one short block

Application of Charlene Butts:
Distance from home to Oakwood .7 miles
Distance from home to Norview .7 "
Distance from home to Rosemont .4 "

Applications of Sheron and Edward H. Smith:
Distance from home to Oakwood 1.3 miles
Distance from home to Norview .7 "
Distance from home to Rosemont .6 "

The Board considered, in line with the Court's remarks, the new unit area for the Rosemont school, as well as transportation facilities and dangers encountered in crossing highways. These questions are essentially for the Board to determine and this Court cannot say that the Board's action is arbitrary, capricious, or discriminatory.

Plaintiffs argue that the Court was in error in holding that, in the exercise of sound discretion and where proof convincingly establishes that the second transfer must hereafter be made to Rosemont, the constitutional right of the child could be deferred for the one year period under these peculiar circumstances. Plaintiffs cite a line of *pre-Brown* decisions relating to the "separate but equal" doctrine, including Carter v. School Board of Arlington County, 4 Cir., 182 F.2d 531; McKissick v. Carmichael, 4 Cir., 187 F.2d 949; McLaurin v. Oklahoma State Regents, 339 U.S. 637; and Sweatt v. Painter, 339 U.S. 629. The theme of these cases is that the constitutional right is *personal* and *present*. Plaintiffs overlook, however, the *Brown* decision which requires in the public schools (as contrasted with state-supported institutions of higher learning) a balancing of the public and private needs, and further provides that "once such a [prompt and reasonable] start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner." Candidly, plaintiffs' counsel are unable to explain the constitutional deferment of rights established by recent public school decisions approving plans calling for "stair-step" desegregation such as Slade v. Board of Education of Harford County, 4 Cir., 252 F.2d 291, cert. den. 357 U.S. 906. In the latter case the plan provided for gradual desegregation of public schools. Certainly the constitutional right of the child was personal and present but, in balancing the public and private needs, the courts gave a stamp of approval to the deferment of these rights which, in effect, totally deprived certain children of such rights as they would undoubtedly have completed the public schools before their rights could be asserted in some instances. The situation may be entirely different where no public school is available such as in the recent Warren County school case from Virginia decided by District Judge Paul in which a stay was denied by Chief Judge Sobeloff. In the case at bar there is, at most, a deferment of such rights for a period of one year, at the end of which the children may again make application. Bearing in mind that the Board is better able to determine the adverse effect of "too frequent" transfers, it cannot be said that the Board acted arbitrarily, capriciously, or even without wisdom.

An order will be entered in accordance with this memorandum; which, together with the references attached and incorporated herein, is adopted by the Court as its findings of fact and conclusions of law.

ORDER

Upon consideration of the pleadings, evidence, exhibits and arguments of counsel, and for reasons stated in a memorandum this day filed, it is

ORDERED that:

1. The prior action of this Court in entering its order of September 2, 1958, denying defendants' motion to defer until September, 1959, the enrollment of the 17 Negro children under the proposed assignments set forth in the report of The School Board of the City of Norfolk filed herein on August 29, 1958, after further consideration of the action of the United States Supreme Court on September 12, 1958, in the case of Aaron v. Cooper, is approved and con-

firmed, and the defendants' motion to defer is DENIED; to which action of the Court the defendants except.

2. The defendants' exceptions to certain of the remarks of the Court delivered on August 25, 1958, to the said defendants are hereby OVERRULED; to which action of the Court the defendants except.

3. The action of The School Board of the City of Norfolk in denying the 134 applications of certain Negro children for enrollment in, or transfer to, certain public schools in the City of Norfolk is hereby APPROVED and said applications are hereby DENIED, to the same extent as though the names of each of the 134 Negro children are set forth herein; reference to the report of the defendants heretofore filed herein on August 29, 1958, being hereby made; to which action of the Court the plaintiffs and certain intervenors except.

4. The Court reserves for further consideration the questions respecting the validity of the resolution, standards, criteria, and procedure promulgated by The School Board of the City of Norfolk on July 17, 1958, and it is so ORDERED.

EDUCATION
School Bombing—North Carolina

STATE v. Lester Francis CALDWELL, et al.

Supreme Court of North Carolina, October 15, 1958, 105 S.E.2d 189.

SUMMARY: Members of a Ku Klux Klan group in Charlotte, North Carolina, were tried in a state court on charges of a conspiracy and an attempt to bomb a Negro public school building. The principal state witness testified that after a reward offer in connection with previous bombings, he acted as an agent of the police, joined the Klan, and subsequently participated in preparation for the school bombing. This witness also tipped off the police, who apprehended defendants at the school with the explosives. Two defendants were acquitted; three were convicted. 3 Race Rel. L. Rep. 464 (1958). Appeals on the ground of entrapment were taken to the Supreme Court. The court found no error and affirmed the convictions since accurate instructions on the law of entrapment had been given to the jury. The court expressed regret, however, at the picture of active participation by the police in the planning an unlawful bombing.

Criminal prosecutions upon two bills of indictment. The bill in No. 27985 charged that Lester Francis Caldwell, William Oliver Spencer, Arthur Monroe Brown, David Dennis Quick, and other person or persons to the State unknown, did unlawfully, wilfully, and feloniously combine, conspire, confederate and plan together to wilfully, maliciously and wantonly injure the Woodland School building by the use of dynamite and other high explosives, etc. The bill in No. 27990 charged that Lester Francis Caldwell and Jack Ayscue did unlawfully, wilfully, maliciously, wantonly, and feloniously injure and damage, and did attempt to injure and damage the Woodland School building by the use of dynamite and other high explosives, etc.

[*Police Agent's Testimony*]

The State's principal witness was Robert Lee Kinley who testified that Caldwell, Spencer and Brown were members of the Klan. "I joined the Klan in January, 1958. I went to Caldwell's with Arthur Brown and they wrote it up out there at Caldwell's house. * * * At the time of or prior to the time I signed up I had talked to officer Ross of the City Police about the Klan, about joining it. As a result of the conversation with Officer Ross, I joined the Klan; it cost $9.00, which was paid by Chief Littlejohn of the Charlotte Police." Kinley testified that on February 5, he, Caldwell, Spencer, Brown, and two others made and burned a cross at the Woodland School in Mecklenburg County.

"After the burning of the cross there was a conversation between me and the other defendants about the use of dynamite; Brown, Caldwell, Spencer, and Quick all wanted to ride back by the school and see what kind of activity they had out there and they wanted to go in another automobile, so we went in my car. * * * We parked there in front of it and the subject of dynamite came up, about bombing the school. Caldwell first brought it up. I did not make any suggestion about dynamiting the school, but Caldwell, Brown, Quick, and Spencer wanted to throw it the following Wednesday night."

The witness testified, as here quoted and summarized, that he, Caldwell, and Spencer went to Monroe in the witness' car to get dynamite. They were unsuccessful but the next day the witness and Caldwell went back to Monroe where the witness furnished the money and Caldwell paid 75c for two sticks of dynamite. "On Saturday afternoon, February 15, I had notified the police we would take the dynamite to the school at this time. * * * After the dynamite was purchased in Monroe, I was with the dynamite until it was taken to the school. I couldn't afford to let it get out of my sight."

Caldwell, Jack Ayscue and the witness drove to the school house in the witness' car. The officers were waiting and immediately arrested Caldwell and Ayscue, and recovered the dynamite with fuse and cap attached.

[*Police Chief's Testimony*]

Frank Littlejohn, Chief of Charlotte Police, testified for the State "* * * Kinley told me plans had been made for using some explosive there on the night of February 12, * * *. He said the Klan was unable to procure the dynamite for that occasion which was postponed 'until he could procure some dynamite' * * *. I never did make him any promise of a reward for information concerning these defendants. * * *

"The first time I had a conversation with Kinley * * * was in the early part of February; * * * Kinley had at that time been to some of the Klan meetings but I don't think he had paid his dues. The $10 I gave was for the purpose of paying his initiation dues into the Klan; * * * I had several in the organization."

C. N. Ross, of the Charlotte Police Department, testified: "It was at or about the time he (Kinley) joined the Klan that I did tell him that there was a reward of $1,000 for the arrest and conviction of persons in connection with the dynamiting here in Charlotte; that was before the cross burning which occurred February 5, * * * before the dynamite was taken by Kinley, Caldwell and Ayscue to the Woodland School."

The officers testified as to admissions by Caldwell and Spencer as to their purpose in using the dynamite at the school. The purpose was publicity in aid of the campaign for membership in the Klan.

Other evidence was introduced by the State which is not repeated here. Only the evidence bearing on the defendants' pleas of entrapment is recited.

In Case No. 27985 the jury returned a verdict of guilty against Caldwell, Spencer, and Brown, and not guilty as to Quick. In No. 27990 the jury returned as to Caldwell a verdict of guilty of "an attempt to unlawfully, wilfully and maliciously to injure and damage the Woodland School building with the use of dynamite." A verdict of not guilty was returned as to Ayscue. From the judgments pronounced on the verdicts, the defendants appealed.

* * *

HIGGINS, Justice.

The two cases are inseparably linked together. The substantive offense is but part and parcel of the conspiracy. The appellants, for their defenses, rely upon their pleas of entrapment. The courts generally hold that a verdict of not guilty should be returned if an officer or his agent, for the purpose of prosecution, procures, induces or incites one to commit a crime he otherwise would not commit but for the persuasion, encouragement, inducement, and importunity of the officer or agent. If the officer or agent does nothing more than afford to the person charged an opportunity to commit the offense, such is not entrapment. The courts do not attempt to draw a definite line of demarcation between what is and what is not entrapment. Each case must be decided on its own facts. This Court, in two recent cases, has stated the rule as it prevails in this jurisdiction: State v. Jackson, 243 N.C. 216, 90 S.E.2d 507; State v. Burnette, 242 N.C. 164, 87 S.E.2d 191, 52 A.L.R.2d 1181. See also, State v. Kilgore, 246 N.C. 455, 98 S.E.2d 346; State v. Wallace, 246 N.C. 445, 98 S.E.2d 473; State v. Boles, 246 N.C.

83, 97 S.E.2d 476; State v. Nelson, 232 N.C. 602, 61 S.E.2d 626; State v. Love, 229 N.C. 99, 47 S.E.2d 712; State v. Godwin, 227 N.C. 449, 42 S.E.2d 617.

Appellants contend that if this Court should hold the evidence of entrapment was not sufficient to entitle them to a directed verdict of not guilty, at least they should be given a new trial for errors committed in the court's charge. Particularly, the defendants object to the following: "* * * or you may return a verdict of guilty as to any two of them in the conspiracy case, and not guilty as to the rest, or you may convict all four of them, or you may return a verdict of not guilty as to all four * * *." Preceding the foregoing as a part of the same sentence, the judge had instructed the jury they might return a verdict of guilty of conspiracy as to Brown, Quick, Spencer, and Caldwell, or "you may return a verdict of not guilty * * *." Directly following the part of the charge to which objection was made, also in the same sentence, the court said: "* * * remembering that the burden is upon the State to satisfy you from the evidence in this case, and beyond a reasonable doubt as to the guilt * * *." Actually the purport of the charge was more favorable than defendants were entitled to. In this respect it must be remembered that not only the four men named were indicted for conspiracy with each other, but also with "other person or persons to the State unknown."

There was evidence Ayscue, "a fellow named Myers * * * two other fellows" attended a meeting, or at least were on hand on one occasion. There was evidence a man in Monroe gave instructions where the dynamite could be procured after Caldwell told him he wanted to bomb the Woodland School. Under the bill any one of the four named could be convicted if he conspired with Ayscue or Myers or the man in Monroe or the "two other fellows," or any one of them. State v. Wynne, 246 N.C. 686, 99 S.E.2d 923. Instead, the court required the State to prove a defendant on trial must have conspired with at least one of the others on trial. The jury acquitted Quick and convicted the other three. There is no indication that the jury misunderstood or drew any unwarranted conclusions from the judge's charge.

[*Instructions Free of Error*]

Not only in the challenged part, but otherwise, the charge met all legal requirements. The court reviewed the evidence in detail, stated the defendants' contentions fully, and applied the law to the evidence in the case. Especially with reference to the law of entrapment, the instructions were carefully and accurately stated. Taken as a whole, as it must be, the charge contains nothing of which the defendants, or either of them, may justly complain.

The evidence in this case does not disclose a wholesome picture. Neither law nor public conscience will tolerate the use of dynamite as a means of settling racial or other disputes. And while the officers of the law are not infrequently hard put to it to ferret out crime, at the same time it is to be regretted that the police department, through its agent, took such an active part in the events which culminated in the arrest at the Woodland School. The agent, in his own car, made two trips from Charlotte to Monroe for the dynamite which was paid for from the money left after paying "initiation" dues. It was fashioned into a bomb —the agent assisted—and carried to the school in his car. This, after he was told by a police officer, "there was a reward of $1,000 for the arrest and conviction in connection with dynamiting here in Charlotte." The conspiracy here involved originated after the agent was told of the reward. It may be he was directing part of his efforts toward the discovery of past bombings. It may be, however, the crimes here charged were an outgrowth of a larger plan which the agent, by virtue of his membership in the organization, had opportunity to see develop. Anyway, the jury has accepted the view the plan to bomb the school originated with the defendants and that they freely accepted the assistance of Kinley. The issues were of fact. The jury's findings are conclusive. In law there is no error.

JOHNSON and PARKER, JJ., not sitting.

EDUCATION
Teachers—New Jersey

Rose BARON v. Maurice J. O'SULLIVAN, et al.

United States Court of Appeals, Third Circuit, July 10, 1958, 258 F.2d 336.

SUMMARY: A New Jersey teacher brought an action in federal district court based upon the Civil Rights Act, alleging that members of the Board of Examiners of Jersey City, had conspired to deprive her of the privilege of receiving a permanent teacher certificate. The action was dismissed for failure of the complaint to specify a denial of any right secured under federal Constitution or statutes. On appeal, the Court of Appeals for the Third Circuit pointed out that although plaintiff had availed herself of review by the Jersey City Board of Examiners, she had failed to appeal to the state Commissioner of Education and to the state Board of Education in turn, as provided for by state law. State administrative remedies not having been exhausted, the court declared that plaintiff had prematurely sought a federal court remedy under the Civil Rights Act, and it affirmed dismissal of the action.

Before GOODRICH, McLAUGHLIN and STALEY, Circuit Judges.

STALEY, Circuit Judge:

Appellant Rose Baron is a teacher holding a certificate of eligibility to teach in the elementary schools of the State of New Jersey. A further written examination and oral interview is required to teach in the schools of Jersey City. Appellant filed a complaint against the members of the Board of Examiners of Jersey City, alleging a conspiracy under color of state law to deprive her of the privilege of receiving a certificate as a permanent teacher in Jersey City. The action is based upon the Civil Rights Act, 42 U.S.C.A. § 1983,[1] with jurisdiction conferred by Section 1343 of Title 28 of the United States Code.[2] After answer was filed, the district court granted defendants' motion for judgment on the pleadings and dismissed the action on the ground that the complaint did not spell out a denial of "any right, privilege or immunity secured by the Constitution and laws of the United States, but of a right or privilege created by or under a law or laws of the State of New Jersey." This appeal followed.

The complaint alleges that plaintiff availed herself of two administrative reviews, both before the Board of Examiners of Jersey City. However, the fourth separate defense in the answer alleges that plaintiff has not exhausted the state administrative remedies available to her.

[*New Jersey School Laws*]

Chapter 3 of Title 18 of the Revised Statutes of New Jersey, Section 14, N.J.S.A. 18:3-14, grants to the Commissioner of Education the power to decide controversies arising under school laws. Specifically it reads:

> "The commissioner shall decide without cost to the parties all controversies and disputes arising under the school laws, or under the rules and regulations of the state board or of the commissioner.
> * * * * *

1. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C.A. § 1983.

2. "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
"(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.
"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." 28 U.S.C. § 1343.

"The decision shall be binding until a decision thereon is given by the state board on appeal."

Section 15 of the same chapter provides for review of the commissioner's decision by the state board. These two steps in the statutory scheme of administrative review were not taken by appellant here, although clearly they were open to her. In re Masiello, 1958, 25 N.J. 590, 138 A.2d 393.

May a litigant properly seek the remedy of a federal court under the Civil Rights Act before exhausting the available administrative remedies of the state? We think not.

[*Exhaustion of State Remedies*]

There is no longer any doubt that where a person's federally-protected civil or constitutional rights are abridged, "resort to a federal court may be had without first exhausting the *judicial* remedies of state courts." Lane v. Wilson, 1939, 307 U.S. 268, 274, 59 S.Ct. 872, 875, 83 L.Ed. 1281, emphasis supplied; see Cooper v. Hutchinson, 3 Cir., 1950, 184 F.2d 119. If, however, the state court in fact is applying an administrative rather than a judicial remedy, resort must first be had to the state court before suit can be brought in the federal court. Prentis v. Atlantic Coast Line Co., 1908, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150.

Certainly in the grant or denial of a teaching certificate by a state board, no judicial process is involved. Such boards, created to review subordinate decisions in their own ranks, are exercising a strictly legislative function with which this court cannot interfere. Carson v. Warlick, 4 Cir., 1956, 238 F.2d 724, certiorari denied, 1957, 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed.2d 664; see also Mitchell v. Wright, 5 Cir., 154 F.2d 924, certiorari denied, 1946, 329 U.S. 733, 67 S.Ct. 96, 91 L.Ed. 633.

Although the usual reason given for the requirement of the exhaustion of administrative remedies is the hesitation of the courts to interfere with state legislative processes, there is a more compelling one, as is apparent here. Appellant alleges a denial of a federally-protected privilege. The decision of the Board of Examiners of Jersey City, reviewable as it is both by the commissioner and the state board, is in a true sense interlocutory. It is merely a tentative determination subject to revision at the discretion of other agencies which are an integral part of the same legislative scheme. We cannot know, therefore, whether the privilege asserted has been denied until the state board has finally made its decision. The present action was premature.

The judgment of the district court will be affirmed.

CIVIL RIGHTS STATUTES
State Action—Alabama

George JOHNSON v. Howard YEILDING, Charles A. Long, Dan R. Hudson, individually and as Members of the Personnel Board of Jefferson County, Alabama, et al.

Alabama Supreme Court, January 26, 1958, 100 So.2d 29.

United States District Court, Northern District, Alabama, Southern Division, July 2, 1958, 165 F.Supp. 76.

SUMMARY: A Negro citizen of Jefferson County, Alabama, in October, 1956, filed in state court as a class suit a bill for a declaratory judgment alleging that defendant members of the county personnel board by express requirement denied Negroes the right to take an examination for police patrolman in Birmingham. Relief was denied, and the Alabama Supreme Court affirmed, on the ground that the action of the board was not reviewable in a declaratory judgment proceeding. 100 So.2d 29 (Ala. 1958). In April, 1958, complainant filed a similar suit in federal district court under the Civil Rights Act. Defendants interposed, among other defenses, the Alabama general one-year statute of limitations while plaintiffs relied on a ten-year statute applicable to "actions against . . . public officers, for nonfeasance, misfeasance or malfeasance in office." The court found the ten-year statute was inapplicable.

The court further held that since an action at law would lie to recover damages the equitable proceeding under the Civil Rights Act would be subject to the applicable state statutes of limitations—in this case the one-year statute. The court held the action barred and entered judgment for defendants. The opinions of the Alabama Supreme Court and that of the United States District Court are set out below.

Alabama Supreme Court Opinion

PER CURIAM.

This is an appeal by complainants from a decree of the circuit court, in equity, dismissing a bill of complaint which sought a declaratory judgment to adjudge an alleged justiciable controversy. The respondents are the personnel director and members of the personnel board of Jefferson County. The trial court dismissed the bill for want of power to adjudge the particular controversy as alleged in the bill.

Complainants allege in the bill that they are Negroes over the age of twenty-one years and are resident citizens of Birmingham, in Jefferson County, Alabama, and that respondents are respectively the director and members of the personnel board of said county, and hold their offices pursuant to Alabama state law. Code of 1940, pocket part, Title 62, sections 330(21), et seq.; Acts of 1945, page 376 (Act of July 6, 1945).

The bill of complaint alleges in paragraph 4 that complainants file this proceeding for a declaratory judgment under Title 7, section 156 of the Code of 1940 for the purpose of determining an actual controversy.

The particular question in controversy is alleged to be whether the practice of respondents in enforcing and maintaining the custom and usage by which complainants and other qualified Negroes are refused the right to take the competitive examination and qualify for the position of police patrolmen for the City of Birmingham solely because of race or color is unconstitutional as a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Federal Constitution.

It is alleged in the 5th paragraph of the bill that the foregoing question is one of common and general interest to the members of the class represented by the complainants, namely, Negro citizens of the United States; and that they are residents of Jefferson County and of the State of Alabama, who possess all of the qualifications which enable them to take the competitive examination for police patrolmen, and who have applied for permission to take said examination, and who possess none of the disqualifications. That members of this class are so numerous as to make it impracticable to bring them all before the court, and for that reason complainants prosecute this action in their own behalf and in behalf of the class.

In paragraph 6 of the bill it is alleged that the requirements for taking the competitive examination are as set out in exhibit "A" to the bill. In that exhibit which contains rules and regulations pertaining to applicants for examination for police patrolmen, it is provided that "applicants must be white, male and meet the following respective age, height and weight limits". The bill further alleges in said paragraph 6 that each of the complainants possess all of the qualifications set out in said rules including that of citizenship, age, height, weight and education, but that they are not white.

The bill further alleges that the respondents maintain a policy not to permit citizens having such qualifications to take the examination unless they are white and they thereby violate the Fourteenth Amendment to the Constitution of the United States.

It is further alleged in the bill that these complainants made application on August 20, 1956 to the director of personnel at the office of the personnel board, and offered to file application and present themselves for examination at the office of the personnel board on August 23, 1956, which was the day scheduled for such examination. In making said application complainants complied with the regulations of the board in every respect. On August 21, 1956 the director of personnel wrote letters to complainants, each separately, advising them that it was his duty under the law to determine whether the applicants possess all the entrance qualifications, and since they do not meet all of said requirements the money which had been forwarded by them as required was returned. On August 29, 1956 complainants wrote to the chairman of the personnel board stating

that on August 20, 1956 they had been refused permission to take examination for police patrolmen scheduled for August 23, 1956, and asked the board to rule on whether or not the action of the director was in accordance with the rules and regulations and sanctioned by the board. On August 30, 1956 the personnel director wrote to the complainants that the personnel board would not meet again until September 3, 1956. On September 5, 1956 the personnel director wrote to complainants stating that the board met on September 4, 1956 and upon consideration of their request confirmed the actions of the personnel director taken on August 20, 1956.

The bill repeated the allegation that in denying the applications of the complainants to take the examination on account of color, the personnel board violated complainants' rights under the Fourteenth Amendment of the Constitution of the United States.

[*Damages Alleged*]

In paragraph 10 of the bill it is alleged that on account of said wrongful act by the respondents the complainants had been damaged in the sum of $25,000, and had suffered irreparable injury by reason of the acts complained of, and that they have no plain, adequate and complete remedy to redress said wrongs and illegal acts other than this action for damages for a declaration of the rights and for an injunction, and that any other remedies to which complainants could be remitted would be attended by such uncertainties and delays as to deny substantial relief and would involve a multiplicity of suits causing further irreparable injury, damage and inconvenience.

The prayer of the bill was in accordance with those allegations. There was a motion by the respondents to dismiss the bill, not for want of equity which has been abolished (Equity Rule 14, Code 1940, Tit. 7 Appendix), but for want of jurisdiction to entertain the bill.

We do not find where this Court has considered a distinction between a motion to dismiss a bill for want of equity and a motion to dismiss the bill because the court had no jurisdiction of the subject matter according to its allegations. But we think there is such a distinction.

The trial judge in rendering his judgment, dismissing this suit for want of jurisdiction, expressed an opinion setting forth the reasons for the conclusion which he reached. The first two reasons, so numbered by him, seem to apply the same principle of law: that is, that the respondents were not sued individually but as officers and that their official position and status were created by law, and that it is essentially making the State a party respondent in violation of section 14 of the State Constitution. The other theory which supported the judgment of the court is that there was no justiciable controversy then existing between the complainants and respondents, if there ever had been one in connection with this litigation, in that, it was more in the nature of a review of the action of the personnel director and personnel board than it was a justiciable controversy between them.

In view of our conclusion that the bill does not show a justiciable controversy, we find it unnecessary to determine whether the bill of complaint makes the State a party respondent in violation of section 14 of the State Constitution. With respect to that question we observe that this bill was filed October 15, 1956. The director of the personnel board had advised complainants by letter dated September 5, 1956 that on September 4, 1956 the board had affirmed the previous action of the director in regard to their application of August 20, 1956. That was a termination of such proceeding seeking an examination by complainants. It was adverse to complainants and was passed on by officers upon whom the law placed the duty to do so. That is the personnel board. In so doing the board acted judicially under section 139, Alabama Constitution of 1901. Ex parte Darnell, 262 Ala. 71, 76 So.2d 770.

It was held in Mitchell v. Hammond, 252 Ala. 81, 39 So.2d 582, that a declaratory judgment was not available to a motorist whose motor vehicle driver's license had been revoked by the director of the department of public safety to review the revocation by declaratory judgment on the ground that the evidence was insufficient to justify revocation. It is made very clear in that case that a declaratory judgment is not available to review the ruling of a board which was acted on a matter on which it is authorized by law to act: that the procedure cannot serve the purpose of a review of nisi prius action. Therefore, it was held that the court was without authority to entertain the bill. That is the status of the instant suit.

It results that the judgment of the trial court should be affirmed.

The foregoing opinion was prepared by FOSTER, Supernumerary Justice of this Court, while serving on it at the request of the Chief Justice under authority of Title 13, section 32 Code, and was adopted by the Court as its opinion.

Affirmed.

LAWSON, SIMPSON, GOODWYN and MERRILL, JJ., concur.

Federal District Court Opinion

GROOMS, District Judge.

This is a "civil rights" suit. Jurisdiction of the Court is invoked under Title 28 U.S.C.A. §§ 1331 and 1343(3). Plaintiff charges a violation of the equal protection and privileges and immunities clauses of the Fourteenth Amendment to the United States Constitution and Title 42 U.S.C.A. § 1981. Relief is sought under Title 42 U.S.C.A. § 1983, and the Federal Declaratory Judgment Act, 28 U.S.C.A. §§ 2201 and 2202.

This action was filed by George Johnson, a Negro citizen of Jefferson County, Alabama, on behalf of himself and others similarly situated. The defendants, Yeilding, Long and Hudson, are sued individually and as members of the Personnel Board of Jefferson County, Alabama, and the defendant Mullins is sued individually and as Director of said Personnel Board. Defendant Yeilding resigned from the Board effective May 20, 1958. Plaintiff has moved to substitute Henry P. Johnston who became a member of the Board on May 29, 1958.

The plaintiff charges that the defendants, acting illegally, but under color of law, statutes, regulations, customs and usages of Jefferson County and the State of Alabama, have deprived him of his privileges and immunities and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution and of the laws of the United States, in that, the defendants have denied him, solely because of his race and color, the right to apply for and to take the examination for the position of police patrolman for the City of Birmingham.

The defendants interposed, among other defenses, the Alabama one-year statute of limitations.[1]

The case was submitted to the Court on the motions to dismiss and on the merits.

1. "Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated." Alabama Code 1940, Title 7, Section 26.

Findings of Fact

1. Following the issuance of a bulletin by the defendants requesting applications for examination for police patrolman for the City of Birmingham, and on August 20, 1956, plaintiff sought to make application for the examination and made a $1.50 application fee deposit, and asked leave to stand the examination on Monday, August 27, 1956. On the following day, Mr. Mullins advised the plaintiff that he did not possess all the entrance requirements prescribed in the examination announcement for police patrolman for the City, and returned his deposit.

2. On August 29, 1956, plaintiff addressed a letter to Mr. Yeilding, the then Chairman of the Personnel Board, stating that he had been told by the Personnel Director that the qualifications specified in the examination announcement were applicable to white males only. In this letter he referred to the fact that on August 27, 1956, he had appeared at the office of the Personnel Board and was again "refused admission to the examination." He requested a "Board Ruling" on whether or not he would be permitted to take the examination the following Monday morning. On August 30, Mr. Mullins acknowledged receipt of the letter of August 29 and stated that the Personnel Board would not hold another meeting before the specified date.

3. On September 5, Mr. Mullins wrote plaintiff that his letter of September 3, 1956,[2] requesting the Personnel Board to rule as to whether or not he would be allowed to take the examination on September 10, 1956, was considered by the Personnel Board at their meeting of September 4, and that the Board affirmed the previous actions of the Director in regard to this matter.

4. On October 15, 1956, plaintiff filed a bill in the Circuit Court of Jefferson County, Alabama, in Equity, for a declaratory judgment. Relief was denied and an appeal was taken from

2. This letter has been misplaced.

this decision, and on January 23, 1958, the decision was affirmed.[3] The Supreme Court held that the bill did not show a justiciable controversy, since the Board had acted judicially on a matter on which it was authorized by law to act and that a declaratory judgment action was not available to review the ruling of the Board in such event.

5. This action was commenced April 21, 1958.

6. The announcement for the examination for police patrolman [4] stated as an entrance requirement that "Applicants must be white." [5]

7. Under the rules and regulations of the Personnel Board, taking an examination and being certified as eligible for employment by the Personnel Director are prerequisites to consideration for appointment as a police patrolman. When an applicant successfully passes the examination, he is placed on the list of eligibles for the position for which he has made application.

Conclusions of Law

1. The Court has jurisdiction of the parties and of the subject matter of this action.

2. This suit arises under the Constitution and laws of the United States and seeks redress for the deprivation of civil rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

3. This action is properly brought as a class suit under Rule 23(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., in as far as it challenges the refusals to furnish application forms for the examination for police patrolman to other than white applicants and in as far as it challenges the denial to such others the right to take the examination and to be placed on the eligible list, solely on account of their race and color. Otherwise, plaintiff and those similarly situated are to be treated as individuals and not as a class. Carson v. Warlick, 4 Cir., 238 F.2d 724.

3. Ala., 100 So.2d 29.
4. As well as for clerks and juvenile supervisor.
5. The law requires the Personnel Director to "prepare and submit to the board for its consideration and approval such forms, rules and regulations as are necessary to carry out the provisions of this subdivision, including the rules governing examinations * * *" and provides that "Such rules and regulations must be approved by a two-thirds majority of the personnel board before becoming effective after which they shall have the force and effect of law * * *." (Code of Alabama 1940, T. 62, § 330(32) Supp.)

4. Since there is no showing that Henry P. Johnston, who is sought to be substituted, has adopted or continues or threatens to adopt or continue the action of his predecessor as required by Rule 25(d), the motion for substitution will be overruled.

5. Actions under the Civil Rights Act are governed by the applicable state statutes of limitations. O'Sullivan v. Felix, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 908; Wilson v. Hinman, 10 Cir., 172 F.2d 914; Mohler v. Miller, 6 Cir., 235 F.2d 153; Francis v. Lyman, D.C.Mass., 108 F.Supp. 884.

There is an Alabama statute [6] which bars "motions and other actions against sheriffs, coroners, constables, and other public officers, for nonfeasance, misfeasance or malfeasance in office," not commenced within ten years.

The Personnel Director and members of the Board are public officers,[7] and unless the quoted statute is applicable as plaintiff contends, this action is barred by the one-year statute.

As noted in the Findings of Fact, the Supreme Court of Alabama determined that the Board acted judicially. The Director was a party in that case. The judgment was affirmed as to him as well as to the Board.

A review of the Civil Service Act reveals that the Director is vested with certain judicial powers and that in ruling upon an applicant's eligibility and qualifications, he acts judicially.[8] In the Court's opinion he so acted in this case. Even though the Director and the Board acted erroneously, as long as they were acting judicially concerning a matter as to which they had authority to act,[9] it cannot be said that they were guilty of misfeasance or malfeasance in office within the purview of the quoted statute.

The Court has not overlooked plaintiff's contention that since he seeks equitable relief in the enforcement of a federally-created right the state statutes of limitation are without application. He relies on Cyclopedia of Federal Procedure, Third Edition, § 15.624, and Holmberg v. Armbrecht, 327 U.S. 392, 66 S.Ct. 582, 584, 90 L.Ed. 743, 162 A.L.R. 719.[10] The Court noted

6. Title 7, § 20, Code of Alabama 1940.
7. See State ex rel. Haas v. Stone, 240 Ala. 677, 200 So. 756.
8. See Sections 330(32), (33), (36).
9. See cases under Note 51 to Section 1983 of Title 42 U.S.C.A., as to immunity of judges and persons acting in quasi-judicial positions in actions under the Civil Rights statutes.
10. See also Moore's Federal Practice, 2nd Ed. par. 3.07(3).

in the Holmberg case that:

> "The present case concerns not only a federally-created right but a federal right for which *the sole remedy is in equity.* Wheeler v. Greene, 280 U.S. 49, 50 S.Ct. 21, 74 L.Ed. 160; Christopher v. Brusselbock, 302 U.S. 500, 58 S.Ct. 350; Russell v. Todd, 309 U.S. 280, 285, 60 S.Ct. 527, 530, 84 L.Ed. 754." (Emphasis supplied.)

In Cope v. Anderson, 331 U.S. 461, 67 S.Ct. 1340, 1341, 91 L.Ed. 1602, which involved actions by the receiver of an insolvent national bank against its shareholders to enforce the statutory double liability imposed by the federal statutes, the Court said:

> "Even though these suits are in equity, the states' statutes of limitations apply. For it is only the scope of the relief sought and the multitude of parties sued which give equity concurrent jurisdiction to enforce the legal obligation here asserted. And equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy. Russell v. Todd, 309 U.S. 280, 289, 60 S.Ct. 527, 532, 84 L.Ed. 754 and cases cited. See, also, Guaranty Trust Co. of New York v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079; Holmberg v. Armbrecht, 327 U.S. 392, 395, 396, 66 S.Ct. [582, 584, 585, 587] 90 L.Ed. 743 * * *
>
> "* * * Moreover, limitations on federally created rights to sue have similarly been considered to be governed by the limitations law of the state where the crucial combination of events transpired. Seaboard Terminals Corp. v. Standard Oil Co., D.C., 24 F.Supp. 1018, Id., 2 Cir., 104 F.2d 659; Bluefields S. S. Co. v. United Fruit Co., 3 Cir., 243 F. 1, 19–20. See Campbell v. City of Haverhill, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280; Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397, 27 S.Ct. 65, 66, 51 L.Ed. 241."

An analogous situation to that here presented was presented in McCaleb v. Fox Film Corp., 5 Cir., 299 F. 48, 50, and was disposed of in the following pronouncement:

> "* * * The present copyright statute (35 Stat. 1075, Comp.St. § 9517 et seq.) contains no provision as to the time within which remedies for infringement must be prosecuted. This being so, actions at law for infringement of copyright are governed by the limitation prescribed for the class of actions to which they belong by the law of the state in which the action is brought. Brady v. Daly, 175 U.S. 148, 20 S.Ct. 62, 44 L.Ed. 109. *Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern actions at law.* Baker v. Cummings, 169 U.S. 189, 18 S.Ct. 367, 42 L.Ed. 711.
>
> "This suit invoked the exercise of a concurrent jurisdiction, in that it sought a recovery of damages suffered due to the alleged infringement. For the recovery of such damages appellant had a remedy at law in an action for damages. 38 Stat. 113 (Comp.St. § 9526). *The suit was not kept from being one which involved the exercise of a concurrent jurisdiction, with the result of making the state limitation or prescription law applicable, by the circumstance that it sought, in addition to an award of damages, the granting of equitable remedies, an accounting and an injunction, as means of better enforcing the purely legal right to damages for infringement.* Hall v. Law, 102 U.S. 461, 26 L.Ed. 217; 21 Cyc. 252, 254. * * *" (Emphasis supplied)

Clearly an action at law lies to recover damages under the statutes here involved as to which the state statute of limitation is applicable. In Russell v. Todd, 309 U.S. 280, 289, 60 S.Ct. 527, 532, 84 L.Ed. 754, it was declared:

> "Even though there is no state statute applicable to similar equitable demands, when the jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations."

This is not a case of exclusive equity jurisdiction instituted to enforce rights cognizable only in equity.

The Court, therefore, concludes that this action is barred by the one-year statute of limitations,[11] and judgment will be entered accordingly.

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11. The Alabama statutes of limitation "apply to and govern both courts of law and courts of equity, whether the claim asserted be legal or equitable debts or obligations." Title 7, § 31, Code of Alabama 1940.

CONSTITUTIONAL LAW
Amendatory Process—Arkansas

Virginia M. HOBAN et al. v. C. G. HALL, Secretary of State.

Supreme Court of Arkansas, September 29, 1958, 316 S.W.2d 185.

SUMMARY: Certain Arkansas citizens petitioned the state Supreme Court to enjoin the Secretary of State from certifying as sufficient a ballot title for a proposed amendment to the Arkansas Constitution, to be submitted to the voters in November, 1958. Popularly named the "States Rights Amendment," it dealt with many subjects, only two of which the court considered. The ballot title's entire reference to those two was: "An Amendment creating a States Rights Commission and Providing for its Duties, Qualifications and Operations; . . . Regulating Voter, Candidate and Party Qualifications; . . . ." The text of the amendment provided as to the Commission that no court might enjoin it from doing anything "deemed necessary and proper" to protect the states' sovereignty: $250,000 annually was designated for its unrestricted use, without legislative action; state and local government officials and employees were required to furnish aid to it upon request, subject to fine and imprisonment and to automatic forfeiture of office for refusal; and it was empowered to make investigations and to hold public and secret hearings. Amendment changes in election laws would extend the period of residence required of voters; specify that a voter must be "of good moral character," understand the duties of citizenship under a republican form of government, and be able to read and write; and require a registrant to reveal his age in years, months, and days. The ballot title, the court declared, failed to indicate that the amendment would "destroy the system of checks and balances" in the state government; that the Commission would have broad inquisitorial powers over the individual not subject to court review; and that election officers would be given broad discretion to apply novel, vague, and distasteful tests as conditions to voting. For not representing an impartial summation of the amendment and not containing enough information to enable the voter to mark his ballot with a fair understanding of the issues involved, the ballot title was held insufficient, and the petition for an injunction was granted.

SMITH, Justice

By this original action the petitioners seek to enjoin the Secretary of State from certifying as sufficient a ballot title for a proposed constitutional amendment, to be voted upon at the general election in November. In substance the petition asserts that the ballot title is so incomplete and so abbreviated that it fails to convey sufficient information to enable an elector to vote upon the measure with intelligence and understanding.

The proposed amendment carries as its popular name "The States Rights Amendment" and has the following paragraph as its ballot title:

> "An Amendment Creating a States Rights Commission and Providing For Its Duties, Qualifications and Operation; Defining an Offense of Barratry and Providing Penalty thereof; Providing for the Suspension of State Funds to School Districts in Certain Cases, the Redistribution of Public School Funds in Certain Districts, the Possible Closing of Schools and Creation of Private Schools in Certain Districts, and the Recall of School Board Members, all of which to Be Determined by Special Elections of Qualified Voters; Regulating Voter, Candidate and Party Qualifications; Providing for Certain Penalties; Providing for a Severability Clause; and, Providing for a Repealing Clause."

The amendment itself is of such extreme length and touches upon so many different subjects that we shall merely summarize the provisions deemed pertinent to this discussion, with the full text being set out as an appendix to the opinion. Even a casual reading of the measure will disclose that it is the most far-reaching proposal ever offered to the state's electorate.

Returning to the ballot title, one sees at once that its language is cast in generalities. The voter is told that the amendment is to create a States Rights Commission, but he is given no

intimation of its powers or duties. He knows that the schools are to be affected "in certain cases" and "in certain districts," but he is given no inkling of what those contingencies actually amount to. He realizes that he is to vote for or against changes in the election laws, but the ballot title supplies no clue as to the nature of those changes.

The single question is whether this ballot title meets the requirements of the constitution. The governing rules are well settled and perfectly familiar. The ballot title need not be a complete abstract of the act. Coleman v. Sherrill, 189 Ark. 843, 75 S.W.2d 248. It must, however, provide the elector with information concerning the choice that he is called upon to make. Bradley v. Hall, 220 Ark. 925, 251 S.W.2d 470. It was pointed out in our leading case, Westbrook v. McDonald, 184 Ark. 740, 43 S.W.2d 356, 44 S.W.2d 331, that "the great body of electors, when called upon to vote for or against an act at the general election, will derive their information about it from the ballot title. This is the purpose of the title."

[*Error of Omission*]

Especially pertinent here is the decision in Walton v. McDonald, 192 Ark. 1155, 97 S.W.2d 81, for it dealt with an error of omission. There the ballot title recited that the proposed measure was an act to provide for the assistance of the aged and the blind, but it failed to state that this assistance was to be financed by the levy of a sales tax and by the appropriation of a third of the taxes upon horse and dog racing. In holding the title to be misleading and therefore insufficient we said: "The title carries an appeal to all humane instincts. Few would object to some provision being made for the support of the aged and blind; but to levy a general sales tax of two per cent, for that, or any other purpose, is a different question altogether, and would furnish the elector, however generous his impulses might be, serious ground for reflection if that information were imparted to him by the title of the question upon which he exercised his right of suffrage."

Our inquiry, then, is whether this ballot title conceals matters which, if disclosed, would furnish the elector with "serious ground for reflection" before yielding to his impulse to vote in favor of an amendment ostensibly furthering the cause of states' rights. After carefully studying the measure as a whole we are unanimously of the opinion that this ballot title fails to supply the voter with the information that the constitution expects him to have. For brevity we shall discuss only the provisions concerning the proposed commission and the election laws.

[*State Rights Commission*]

With respect to the commission the ballot title merely tells the elector that the measure will create a States Rights Commission and provide for its duties, qualifications and operation. The cause of states' rights, like that of the aged and the blind, is deservedly a popular one and undeniably appeals to the great body of the electorate. But are there provisions in the amendment which, if made known, would give the voter serious ground for reflection?

We have no doubt that there are. The Commission, created by Article I of the measure, consists of twelve members. Sections 5 and 6 of this article destroy the system of checks and balances that has characterized our government since its birth. Section 5 provides that no court shall be empowered to enjoin the Commission from performing the duties set out in the amendment. Those duties, however, are not clearly defined. By § 7 the Commission is invested with the duty and the power to "perform any and all things deemed necessary and proper" to protect the sovereignty of the several states and to resist the usurpation of the rights reserved to the states. Within the vague limits of this clause it is difficult to conceive of any power—legislative, executive, or judicial—that the Commission might not lay claim to. The ballot title, it may be observed, does not even mention the powers of the Commission, much less does it give a hint of their unlimited scope.

Having immunized the Commission from the action of the state courts, the amendment next frees it from the control of the state legislature. It has traditionally been the function of the legislative branch to exercise some measure of restraint over the other departments, through its power to enact laws and to control the public purse. But here that restraint is swept away. Since the Commission's powers would be conferred by the constitution, they could not be affected by any laws that might be passed. And by § 6 the General Assembly is deprived of any financial supervision over the Commission. This section makes an annual appropriation of $250,000, which the Com-

mission is at liberty to spend in any way it chooses. It may be noted that the General Assembly, in creating a State Sovereignty Commission that superficially resembles the proposed States Rights Commission without the latter's unbridled powers, deemed an annual appropriation of $30,000 to be sufficient. Acts 83 and 170 of 1957. It will also be observed that the ballot title does not suggest to the voters that a quarter of a million dollars is to be appropriated every year, without any effective safeguard over its expenditure.

It is really not enough to say that the proposed Commission would have equal status with the other branches of the state government; the amendment contemplates that every other department shall be subservient to the Commission. Section 10 of Article I requires all elective and appointive officers and employees of the state and its subdivisions to cooperate with the Commission and to render such aid and assistance as may be requested by the Commission. By Article V if any person, public official, or employee of the state fails to carry out "the clear mandates" of the amendment he is subject to a fine of not more than $5,000, to imprisonment for not more than a year, and to automatic forfeiture of his office. It is obvious that under the measure before us every public officer and employee in the state, without exception, would live in daily fear of offending the Commission.

Nor is the private citizen to be left untouched by the unlimited powers of the Commission. By §§ 8 and 9 of Article I the Commission is given broad authority to make investigations and to conduct public or secret hearings. It is evident that in the exercise of its inquisitorial power the Commission might interrogate any citizen in the state about his business affairs, his private life, his political beliefs, or any other subject that can be imagined. Although the measure purports to preserve certain fundamental rights of witnesses called before the Commission, these provisions are meaningless in view of the Commission's immunity from the action of the judiciary. The blunt truth is that, however, improper the Commission's inquiries might be, the witness's only choice would be to answer the questions or go to jail for contempt.

We have said enough, we think, to demonstrate beyond any question that, with respect to the proposed Commission, the ballot title fails to disclose essential facts that the voter is entitled to know before making up his mind. Much the same situation exists with reference to the changes in the election laws that would be brought about by the measure.

[*Changes in Election Laws*]

On the latter subject the ballot title simply tells the elector, six words, that the amendment will regulate voter, candidate, and party qualifications. In fact, however, the proposal embodies such extensive innovations in the election laws that we cannot conscientiously suppose that the average voter would regard them as immaterial.

In addition to lengthening the period of residence required for qualified electors the measure introduces novel conditions to the right to vote. Section 5 of Article IV specifies that an elector must be "of good moral character," that he understand the duties and obligations of citizenship under a republican form of government, and that he be able to read and write. It is evident that vague tests such as these leave much to the discretion of the election officers, who are in a position to disqualify any one they choose. Another change in the election laws is a requirement that an applicant for registration give his or her date of birth and exact age in years, months, and days. We have no doubt that this demand would be so distasteful to a substantial number of men and women that they would forego their right to vote rather than comply with this requirement. Yet the ballot title gives no information about these various amendments to the election law.

The wisdom of the measure does not, of course, concern the courts, for the people undoubtedly have the right to amend the constitution in any way they like. It is our duty, however, in a case of this kind, to approve the ballot title only if it represents an impartial summation of the measure and contains enough information to enable the voters to mark their ballots with a fair understanding of the issues presented. Tested by this standard, the ballot title now before us is clearly insufficient.

The petition for an injunction is accordingly granted.

* * *

Appendix

(Full Text of the Proposed Amendment)

BE IT ORDAINED BY THE PEOPLE OF THE STATE OF ARKANSAS THAT THE FOLLOWING BE ADOPTED AS AN AMENDMENT TO THE CONSTITUTION:

Article I–States Rights Commission

Section 1. Communism, being an ideology with its purpose to destroy the freedom and liberty of all people throughout the world, its major weapon being the fomentation of strife and disharmony calculated to turn class against class and race against race, thereby upsetting time honored social patterns which have been attained in this country, not by prejudice but by a background of rich experience, all of which interferes with the exercise of rights reserved to the states; therefore, Communism is hereby declared to be against the public policy of the State of Arkansas.

Section 2. There is hereby created the States Rights Commission, which shall be composed of:

The Governor, the Attorney General, the Lieutenant Governor and Speaker of the House of Representatives, each of whom shall be an ex-officio member.

Three citizens of Arkansas who shall be appointed by the Governor; one of whom shall reside East of White River; one of whom shall reside South of the Arkansas River; and one of whom shall reside West of the White River and North of the Arkansas River;

Two members of the State Senate who shall be appointed by the President of the Senate by and with the approval of at least eighteen (18) members of the Senate;

Three members of the State House of Representatives who shall be appointed by the Speaker of the House of Representatives by and with the consent of at least fifty-one (51) members of the House of Representatives; one of said appointees shall reside South of the Arkansas River; one of them shall reside East of the White River, and one of them shall reside North of the Arkansas River and West of the White River.

The ex-officio members of the Commission and members from the Senate and House of Representatives shall serve during the terms of their respective offices and until their successors are elected and qualified. The members appointed by the Governor shall serve during the term of the Governor who appointed them and until their successors are appointed and qualified.

Section 3. The Governor shall be Chairman of the Commission, and the President of the Senate Vice-Chairman, with authority to act in the absence of the Chairman. Seven (7) members of the Commission shall constitute a quorum for the transaction of business.

Section 4. The Commission shall meet not less than one day each month and at such other times as the majority of the members shall deem it necessary. Should any member willfully fail and refuse to attend two consecutive meetings without reasonable cause, such member shall be removed from said Commission and from any other office he or she might hold under and by the authority of the State of Arkansas.

Section 5. No court in the State of Arkansas shall be empowered to enjoin the Commission from the performing of its duties as set out in this Amendment.

Section 6. The Commission may employ a secretary and such other legal, professional, expert, secretarial, clerical and other help deemed necessary and proper to carry out the objectives and purposes of this amendment; and it is hereby authorized and empowered to fix the compensation for such employees at any reasonable amount, and pay such other fees as from time to time may be required. Ex-officio members of the commission shall serve without remuneration in addition to that otherwise received by them from the State. Other members of the Commission shall receive $35.00 per day for each day spent on the business of the Commission. All members of the Commission shall be reimbursed for actual living and travel expenses incurred by them. In order to defray the expenses of the Commission, the Treasurer of the State shall, before the end of the first quarter of each fiscal year, set aside and credit to a fund hereby designated "The States Rights Commission Fund" the amount of $250,000, which fund shall be drawn on by the Commission to meet its expenses. The Treasurer shall deduct the amount of this fund from money received by him, that would otherwise be credited to the General Revenue Fund. Nothing herein shall be construed to prohibit the Commission from receiving and expending additional funds by way of

private gifts or appropriations by the General Assembly. Full and complete accounting shall be kept and made by the Commission of all funds received and expended by it. The state auditors shall annually audit the expenditures of all funds received by the Commission from all sources.

Section 7. It shall be the duty of the Commission, and it shall have power in the name of the State of Arkansas or any political sub-division thereof, to perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Arkansas and her sister states from encroachment thereon by the Government of the United States, or by any government of any nation, or federation of nations, or any branch or department or agency thereof, and to resist the usurpation of the right and the powers reserved to this State or her sister states by such governments, branches, departments or agencies.

Section 8. The Commission may make investigations and/or hold hearings (whether public or in executive session) in connection with any investigation made by it pursuant to the provisions of this Amendment. Witnesses at Commission hearings shall have the right to be accompanied by counsel of their own choosing, who shall have the right to advise witnesses of their rights, and to make brief objections to the relevancy of questions and to procedure. At least twenty-four (24) hours prior to his testifying, a witness shall be given a copy of that portion of the motion or resolution scheduling the hearing which copy shall state the subject of the hearing; and at the same time he shall be given a statement of the subject matter about which he is to be interrogated. The privileged character of communication between clergyman and parishioner, doctor and patient, lawyer or accountant and client, and husband and wife, shall be scrupulously observed. Every witness who testifies in a hearing shall have a right to make an oral statement and file a sworn statement which shall be made a part of the transcript of such hearing, but such oral or written statement shall be limited to material relevant to the subject of the hearing.

Section 9. The Commission shall have power to issue subpoenas for witnesses to appear at hearings conducted by the Commission, and to issue subpoenas *duces tecum* directed to witnesses. Subpoenas shall be issued by the Chairman or Vice-Chairman of the Commission only, upon written notice to all members of the Commission, with a statement as to the identity of the witness or material and their relevancy to the investigation or hearing already authorized. Upon request of any member of the Commission, the question of whether a subpoena shall be issued or remain in force if already issued, shall be decided by a majority vote.

In case of contumacy or refusal to obey a subpoena issued by the Commission, any Circuit Court of the State of Arkansas within the jurisdiction of which the investigation or hearing is to be carried on, or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found, or resides, or transacts business, shall, upon application of the Chairman or Vice-Chairman of the Commission, have jurisdiction to issue to such person an order requiring such person to appear before the Commission, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the Court may be punished by said Court as contempt thereof.

The Chairman, Vice-Chairman or Secretary of the Commission is hereby authorized and empowered to administer oaths to witnesses; and any witness appearing and testifying before the Commission who shall willfully and corruptly testify falsely to any material fact shall be guilty of perjury and shall be subject to prosecution and punishment therefor as provided by law; and if such perjury be manifest, or if the witness shall refuse to testify, or to produce any books, records, papers or documents, he shall be guilty of contempt of the Commission and shall be punished in cases of contempt of the Circuit Court of the State of Arkansas.

Any person sworn and examined as a witness before said Commission without procurement or contrivance on his part shall not be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify; nor shall any statement made, or book, paper or document produced by any such witness be competent evidence in any criminal proceeding against such witness other than for perjury in delivering his evidence. Should any witness refuse to testify to any fact, or refuse to produce any book, document or paper touching which he is to be examined, on

the ground that he will thereby incriminate himself, or that it will tend to discredit or render infamous, the Commission shall consider such refusal as part of the evidence and shall inform the public of the refusal of such witness to so testify, and the facts and circumstances under which such refusal was made.

Section 10. All elective and appointive officers and employees of the State and the political sub-divisions thereof, including all public schools, and institutions of higher learning, shall co-operate with the Commission and render such aid and assistance as may be requested by them by the Commission.

Section 11. All persons, corporations, societies, organizations and other groups of persons who are found by a majority of the members of the States Rights Commission to be engaged in activities designed to further the cause of Communism shall be declared subversive and shall be required to file with said Commission a complete report of their activities within the State of Arkansas, including a list of names and addresses of their officers and members, a detailed certified financial report showing names and addresses of their contributors and expenditures, and such other information as the General Assembly shall require.

Article II—Barratry

Section 1. Any lawyer who shall represent himself to be an attorney for any person, corporation, society, organization or other group of persons who are engaged in activities which foment racial unrest, without having been personally and specifically solicited and employed by said client or clients such attorney holds himself out to represent, or if such attorney or anyone acting in his behalf solicits said client or clients, said attorney shall be deemed guilty of barratry and in addition to the penalties provided by the General Assembly shall be disbarred and forever prohibited from the practice of law in the State of Arkansas.

Article III—School Requirements

Section 1. No state funds shall be allocated to school districts in which the Negro and Caucasian races are mixed in classrooms, athletic or social activities in any school or schools within said district, except that such mixing of the Negro and Caucasian races shall have been sanctioned by a prior affirmative vote of the majority of the qualified electors in such district.

Section 2. Any school against which a decree, order or proclamation of any court or executive has been rendered, or shall be rendered, causing the mixing of Negro and Caucasian students, and any school or schools from which the students were transferred or were to be transferred in compliance with such decree, order or proclamation, shall be closed forthwith from and after the effective date of this Amendment.

Upon the closing of such school or schools an election shall be held at the earliest possible date in said school district to determine whether or not the qualified electors in said district are for or against mixing of the Negro and Caucasian races in their public schools. Should the majority of the qualified electors in said district favor mixing of the Negro and Caucasian races, the school or schools would be reopened upon an integrated basis. Should less than a majority of the qualified electors in said school district vote to mix the Negro and Caucasian races, then the affected school or schools, both Negro and Caucasian in said district shall be closed, and the physical plants and equipment of such shall be sold or leased for operation of private schools.

Section 3. The tax monies and state aid over and above that portion of said funds set aside for the retirement of bonded indebtedness of such schools shall be divided *pro rata* among the educable children of school age, regardless of color, who were former students of such affected schools, or who reside in the attendance area of such affected schools. Said money shall be used only for the education of said children, in schools meeting the minimum accreditation standards.

Section 4. Nothing in this amendment shall disturb the status of teacher tenure or teacher retirement benefits.

Section 5. Upon petition of not less than ten per cent (10%) of the qualified electors in any school district in the State of Arkansas, all elected school officials within said school district named in said petition, shall stand for re-election at a special election; the ticket shall be open for other electors to qualify as candidates. Such special election shall be held not later than one

month after certification of the recall petition by the county clerk. In no event shall more than one such special election be held in any calendar year.

Section 6. All contracts for school personnel shall be entered into subject to ratification by the school board as it may be constituted following any special election under the provisions hereof.

Article IV—Voting Privileges
Candidate and Party Qualifications

Section 1. The right to vote in Arkansas shall be subject to the provisions of this amendment; provided, however, nothing herein shall be construed as repealing the Poll Tax requirements.

Section 2. Every citizen of this State and of the United States native born or naturalized, not less than twenty-one years of age, and possessing the following qualifications, shall be an elector, and shall be entitled to vote at any election in the State by the people.

Section 3. Each voter shall have been an actual *bona fide* resident of the State of Arkansas for two years, of the County one year, of the municipality in municipal elections four months, and of the precinct in which he offers to vote three months next preceding the election; provided, that removal from one precinct to another in the same county shall not operate to deprive any person of the right to vote in the precinct from which he has removed until three months after such removal; provided, further, that removal from one country to another shall not deprive any person of the right to vote in the county from which he has removed for district officers to be elected in a district which includes the county to which he has removed, or for state officers, whether the county be in the same district or not, until he shall have acquired the right to vote for such officers in the county to which he has removed.

Section 4. Each voter shall be, at the time he offers to vote legally enrolled as a registered voter on his own personal application, in accordance with the provisions of this Constitution, and the laws enacted thereunder.

Section 5. Each voter shall be of good moral character and shall understand the duties and obligations of citizenship under a republican form of government. He shall be able to read and write, and shall demonstrate his ability to do so when he applies for registration by making, under oath, administered by the registration officer or his deputy, written application therefor, in the English language, which application shall contain the essential facts necessary to show that he is entitled to register and vote, and shall be entirely written, dated and signed by him, except that he may date, fill out, and sign the blank application for registration hereinafter provided for, and, in either case, in the presence of the registration officer or his deputy, without assistance, or suggestion from any person or any memorandum whatever, other than the form of the application hereinafter set forth; provided, however, that if the applicant is unable to write his application by reason of physical disability, the same shall be written at his dictation by the registration officer or his deputy, upon oath of such disability.

The application for registration above provided for shall be a copy of the following form with the proper names, dates and numbers substituted for the blanks appearing therein, to-wit:

"I am a citizen of the United States and of the State of Arkansas. My name is Mr. ..... Mrs. ..... Miss.....
I was born in the state (or country) of ....., County of..... on the ..... day of ..... in the year.....
I am now ..... years, and ..... months and ..... days of age. I have resided in Arkansas since ....., in the county since ....., and in Precinct No. .....,
in Ward No. ..... of this county continuously since ..... I am not disfranchised by any provision of the Constitution of this State. The name of the householder at my present address of.....is ..... My occupation is .....
My color is ..... My sex is .....
I am not now registered as a voter in any other ward or precinct of this State, except ..... My last registration was in Ward ..... Precinct ....., County ..... I am now affiliated with the ..... Party.

.....
Signature

Sworn to and subscribed before me:

.....
Registration Officer"

Section 6. Each voter must in all cases be able to establish that he is the identical person whom he represents himself to be when applying for registration, and when presenting himself at the polls for the purpose of voting in any election, or primary election. At any time of voting he must present his registration certificate for identification. In all instances of voting in any election or primary election the election officials must make proper notation on the elector's registration certificate as to time and polling place of his appearance and as to the propriety of his party affiliation.

Section 7. The General Assembly shall enact laws to secure fairness in party primary elections, conventions, or other methods of naming party candidates. No person shall vote at any primary election, or in any convention, or other political assembly held for the purpose of nominating any candidate for public office, unless he is at the time a registered voter, and a certified member of the political party holding such election, convention, or assembly, and has such other and additional qualifications as may be prescribed by the party of which candidates for public office are to be nominated. All ballots in any election or primary election must designate the race—either Caucasion or Negro—of all candidates appearing thereon. And in all political conventions in this State the apportionment of representation shall be on the basis of population. No person shall be chosen as a delegate by any political party in this State to represent such party in any convention, local, state or national unless such delegate is a duly qualified elector under the provisions of this amendment. No provision of this amendment shall be construed as, nor shall any laws be passed by General Assembly, prohibiting or unreasonably restricting the formation of additional political parties, or binding any political party in this State to any national political party bearing the same name.

Section 8. Any person possessing the qualifications for voting prescribed by this amendment, who may be denied registration, shall have the right to apply for relief to the Circuit Court for the county in which he offers to register. Said court shall then try the cause, giving it preference over all other cases, before a jury of twelve, nine of whom must concur to render a verdict.

Any duly qualified voter of this State shall have the right to apply to the Circuit Court to have stricken off any names illegally placed or standing on the registration rolls of any county within the jurisdiction of said court; and such application shall be tried by preference before a jury of twelve, nine of whom must concur to render a verdict. Such application hereinabove provided for shall be without cost.

Section 9. The following persons shall not be permitted to register, vote or hold office or appointment of honor, trust, or profit in this State, to-wit: Those who have been convicted of any crime which may be punishable by imprisonment in the penitentiary, and not afterwards pardoned with express restoration of franchise; those actually confined in any public prison or county farm; all interdicted persons, and all persons notoriously insane or idiotic, whether interdicted or not.

Section 10. The General Assembly shall further implement this amendment by appropriate legislation. The qualifications herein provided for are in addition to other qualifications as are now required by law except those laws in conflict herewith.

Article V—Penalties

Section 1. No person, public official or employe of the State of Arkansas or of any political subdivision thereof, shall have immunity from arrest, prosecution and trial for the violation of the provisions of this amendment or penal laws the General Assembly shall provide for the willful failure and refusal to carry out the clear mandates of this amendment, and in addition to the penalties, shall automatically forfeit his or her office.

Section 2. Any person, public official, or employee of the State of Arkansas or of any political subdivision thereof, who shall wilfully fail and refuse to carry out the clear mandates of this amendment shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than $5,000.00 or imprisonment for not more than twelve (12) months, or by both such fine and imprisonment.

Article VI—Severability

Section 1. If any section, paragraph, sen-

tence or clause of this amendment shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this amendment, but such other part shall remain in full force and effect.

Article VII—Repealing Provision

Section 1. All parts of the Constitution of the State of Arkansas in conflict with this amendment be, and the same are, hereby repealed.

ELECTIONS
Registration—Mississippi

H. D. DARBY on behalf of himself and others similarly situated v. James DANIEL, Circuit Clerk of Jefferson Davis County, Mississippi, and Joe T. Patterson, Attorney General of the State of Mississippi.

United States District Court, Southern District of Mississippi, Jackson Division, November 6, 1958, Civil Action No. 2748.

SUMMARY: A Negro citizen of Mississippi brought a class action in federal district court alleging that defendant clerk and registrar, through enforcement of unconstitutional state voting requirements, had refused to register him solely because of his race and color, in violation of the Fourteenth and Fifteenth Amendments. A 1955 amendment to the state constitution, required one registering for the first time to "be able to read and write any section of the constitution of this state and give a reasonable interpretation thereof to the county registrar" and to "demonstrate . . . a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government."

The three-judge court rejected the contention that these requirements are unconstitutional on their face, observing that the United States Supreme Court has upheld substantially identical voting requirements. The court refused to take judicial notice of an alleged legislative purpose to enable registrars to discriminate against Negroes by means of the amendment. Also rejected was the further contention that the registrar had actually practiced racial discrimination in administering literacy requirements. The court referred to evidence showing illegible, incomplete, inaccurate, incoherent, and unresponsive written statements by plaintiff, and noted the absence of evidence that defendant had ever treated any white person more favorably than he had Negroes.

Procedurally, it was found that the plaintiff had failed to exhaust his administrative remedies under state law, and that the Civil Rights Act of 1957, in granting jurisdiction to federal district courts regardless of whether a plaintiff "shall have exhausted any administrative or other remedies that may be provided by law," was limited to proceedings which the Attorney General of the United States might institute for private individuals. Finally, as to the defendant state attorney general, no evidence was found to support the allegation that he had threatened to enforce state champerty and maintenance statutes against plaintiffs and his attorneys. The court therefore dismissed the complaint, refusing to render a declaratory judgment or to grant injunctive relief in favor of plaintiffs.

Before CAMERON, Circuit Judge, and MIZE and CLAYTON, District Judges.

CAMERON, CIRCUIT Judge:

The case before us, with some of the facts, is thus stated in plaintiff's brief: "This is an action for a declaratory judgment and injunction brought by plaintiff on behalf of himself and others similarly situated. The gravamen of plaintiff's complaint is that he and other Negro

citizens of Jefferson Davis County, Mississippi have been denied the right to register in order that they might vote, solely because of their race and color, through the enforcement of a policy of discrimination against Negro Voters, the enforcement of unconstitutional voting requirements, and the discriminatory administration of valid requirements. The plaintiff also seeks to enjoin enforcement of a state statute which makes it a crime, punishable by imprisonment for one year, for him to accept financial and legal assistance in the prosecution of this action and for his attorneys and others to give such assistance."

"The plaintiff in this case is an adult Negro citizen of the United States and of the State of Mississippi, residing in Prentiss, Jefferson Davis County, Mississippi, since 1947. He is not an idiot, an insane person, or an Indian who is not taxed, and is more than twenty-one years of age. His occupation is that of a minister of the Gospel. He has never been convicted of any crime enumerated in the Mississippi Constitution as grounds for disqualification as a voter. He has paid his poll tax for the years 1956 and 1957. He was a duly qualified and registered voter of Jefferson Davis County prior to January 1, 1954, and exercised his right to vote in various elections held in the county between 1950 and 1955, having registered for the first time in the early part of 1950.

"In 1954 the Legislature of the State of Mississippi proposed that Paragraph 244 of the Mississippi Constitution of 1890 be amended, and after the proposed amendment was ratified by a vote of the electorate, it became law in 1955." Defendant Daniels was and is Circuit Clerk and Registrar of Jefferson Davis County and will be referred to as defendant unless otherwise noted.

[*Qualifications of Electors*]

The qualifications of Electors are set forth in Article 12 of the Mississippi Constitution of 1890 as amended, titled "Franchise," and the article embraces Sections 240-253, inclusive.

The Sections of the Article, other than Section 244 which is challenged by plaintiff, grant the right to vote to inhabitants of the state, except idiots, insane persons and Indians not taxed, who are citizens of the United States, twenty-one years old or over, with certain residence requirements, who have duly registered as provided in the article and who have never been convicted of certain listed crimes and who have paid all poll taxes legally required of them before February 1st of the year in which they offer to vote. Section 249 provides: "And registration under the Constitution and laws of this State by the proper officers of this State is hereby declared to be an essential and necessary qualification to vote at any and all elections."

Section 244 of Article 12, prior to the amendment attacked, was in these words:

> "# 244. On and after the first day of January, A. D. 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the constitution of this State; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof. A new registration shall be made before the next ensuing election after January the first, A. D. 1892."

Amended Section 244[1] reads as follows in its pertinent portions:

> "Section 244. Every elector shall, in addition to the foregoing qualifications be able to read and write any section of the Constitution of this State and give a reasonable interpretation thereof to the county registrar. He shall demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government."

Following the quoted language the amended section goes on to provide that a person applying to register shall make a sworn written application on a form to be prescribed by the State Board of Election Commissioners, and concludes with these words: "Any new or additional qualification herein imposed shall not be required of any person who was a duly registered and qualified elector of this state prior to January 1, 1954. The Legislature shall have the power to enforce the provisions of this section by appropriate legislation."

In February, 1956 the Board of Supervisors of Jefferson Davis County ordered a new registration and due notice thereof was given by publication as required by law. This new regis-

1. In 1954 the Legislature of Mississippi proposed that Section 244 of the Constitution of 1890 be amended, and after the proposed amendment was ratified by a vote of the people it became a part of the Constitution in 1955.

tration was in line with the practice which had been followed in the county for a number of years, new registrations having been had in the years 1906, 1923, 1934 and 1949.

Defendant Daniel first became Circuit Clerk and Registrar of Jefferson Davis County January 1, 1956. Without dispute and based upon his opinion that, since a new registration had been ordered and forms had been sent to him by the State Election Commissioners, he was so obligated, he began the practice of requiring all applicants, regardless of color, to take the examination provided by the amendment and covered by the questionnaire, which policy he pursued until about October 15, 1956. Plaintiff Darby first entered his office to register on June 29, 1956, and defendant Daniel handed him the questionnaire to be completed pursuant to the custom then universally followed by him. No discussion was had between plaintiff and defendant. Plaintiff completed a part of the written examination and signed his name and left.

[*Complaint to President*]

He had consulted the attorney now representing him and had written a letter of complaint to the President of the United States some weeks before that, which resulted in an investigation of defendant Daniel being made by the Federal Bureau of Investigation. About October 1, 1956 defendant Daniel received a letter from the United States Attorney in Jackson, Mississippi requesting that Daniel come to his office for conference. He responded to the request, going in company with the county attorney to the office of the United States Attorney. There he was advised that the Department of Justice took the position that persons who, like plaintiff Darby, had been registered prior to January 1, 1954 were required to take only the oral examination covering the qualifications as set forth in the original Section 244 of Article 12 of the Mississippi Constitution. Daniel left the United States Attorney and went to the Attorney General of Mississippi, who advised him in writing October 12, 1956, that no person registered prior to January 1, 1954 was *required* to take the written examination provided by the amendment. Thereafter, Daniel pursued the policy of giving all applicants of Darby's class the option to take the oral examination provided by the original section or the written examination provided by the amendment.

[*Given Oral Examination*]

About November 2, 1956 plaintiff Darby again presented himself for registration and was given the oral examination. He did not pass in the opinion of Daniel and was so advised. Neither Darby nor Daniel remembered what section of the Constitution Darby was called upon to interpret. About June 8, 1957, Darby came to Daniel's office again to register and was given the oral examination, and again failed to pass. A short time thereafter the F.B.I. made a further examination into Daniel's operation of his office in which Daniel explained freely what happened.

On June 22, 1957, plaintiff Darby again presented himself to defendant Daniel, this time requesting that he be given the written examination as provided by the amendment. Without dispute, plaintiff followed this course on the advice of his attorney, whom he had first consulted more than a year before. He was given the written examination on the forms furnished to Daniel by the state officials, and again Daniel ruled that he had not qualified for registration.[2]

2. After the Court had concluded the hearing of this action July 22-25, 1958, Rutha Dillon presented a "Motion to Intervene" served and filed September 16, 1958, setting forth that she had testified as a witness for plaintiff Darby and that her interest "may not be adequately represented by plaintiff and applicant may be bound by a judgment in this action." The application was filed by the attorneys already representing plaintiff Darby and with it was filed a memorandum brief in which she claimed that she was filing the application under Rule 20(a) and Rule 24(b)(2), F.R.C.P. Her application asked that she be permitted to intervene upon her testimony already given and upon the testimony introduced at the hearing. Her desire to intervene was grounded on her apprehension that plaintiff Darby might not represent her inasmuch as she had not registered prior to January 1, 1954, whereas Darby had registered prior to that time and had requested and taken the written examination provided by the amendment to Section 244, although not required so to do.

The defendants resisted the requested intervention, taking the position that the application came too late and that plaintiff Darby, having volunteered to take an examination he was not required to take, was not in position to maintain the action brought by him. The amendment provides that Darby should not be "required" to submit to its terms, but contains no prohibition against his voluntarily doing so. Both he and defendant Daniel proceeded in the written examination before us in obedience to the terms of the amendment, and we do not pause to resolve this question, arising as it does after all of the briefs have been submitted and much study given to the fundamental issues involved.

We see no harm to ensue from granting the application to intervene and have entered an order permitting the requested intervention upon the terms set forth. The intervenor will be referred to hereafter as a plaintiff.

Plaintiff Darby appealed, as provided by law, from the ruling of defendant Daniel rejecting his written application (he had not appealed from the other three rejections), and the evidence shows that in so doing he was guided by one of his attorneys of record who had been employed by the N.A.A.C.P. Legal Defense and Educational Fund. His attorney filed with the Registrar a writing bearing the heading "Appellant's Contentions."[3] Plaintiff Darby and his attorney appeared at the office of Daniel on October 7, 1957, but there was no meeting of the Commissioners scheduled or held at that time.[4] Said plaintiff and his attorney were advised that the Commissioners would meet at the Registrar's office on the Tuesday after the third Monday in March, 1958; plaintiff Darby testified that Daniel told them of a March meeting. No provision is made for notice to persons desiring to present contests of the actions of the Registrar and we do not find that defendant Daniel made any agreement to give any notice to plaintiff or that such an agreement, if made, would have any legal effect. The appeal, apparently begun as a test of the provisions of the Constitution and Statutes here under attack, was not prosecuted, but this civil action was filed four days before the Election Commissioners met in Jefferson Davis County. The appeal is still pending before them.

Other portions of the testimony will be referred to under the discussion of the several points raised by the parties.

[*Bases for Challenge*]

From the written contentions so filed on the appeal, the averments of the Complaint and plaintiff's brief it appears that the attack on the Mississippi Constitution and implementing statutes is based upon three grounds: that Section 244 is unconstitutional and void on its face because it bestows upon the Registrar "an uncontrolled discretion to determine who is able to interpret the Constitution of . . . Mississippi" and who is able to demonstrate an understanding of the duties of citizenship; that the section is unconstitutional and void because the purpose of said provisions was to enable the registrars to "discriminate against otherwise qualified Negroes;" and that said section is being administered "in such a manner as to discriminate against Rev. H. D. Darby and other Negroes otherwise qualified, solely because of their race and color."

The complaint specifies that the uncontrolled discretion referred to results from the amendment's vague and uncertain language "which fails to set up a standard of reasonableness capable of objective measurement." The precise prayer of the complaint asks an injunction "restraining defendant from enforcing those parts of said constitutional and statutory provisions which require an elector to give defendant 'a reasonable interpretation' of a provision of the Constitution of the State of Mississippi and which require that an elector "demonstrate to defendant a 'reasonable' understanding of the duties and obligations of citizens under a constitutional form of government." The allegations of unconstitutionality are predicated upon the due process clause of the Fourteenth Amendment and the provisions of the Fifteenth Amendment.

I.

(1) Any consideration of the constitutionality of the challenged portions of this amendment begins with the fundamental fact that, under

3. This document set forth that plaintiff Darby had appealed to the Board of Commissioners within five days from the refusal of Defendant Daniel to register him; that Section 244 of the Mississippi Constitution as amended "is unconstitutional and void on its face since it bestows upon the registrar of voters an uncontrolled discretion to determine who is able to interpret the Constitution of the State of Mississippi and who is able to demonstrate an understanding of the duties and obligations of citizenship in a democratic form of government," said allegation being applied also to the Mississippi statutes implementing the constitutional provision. The document further set up that the constitutional and statutory provisions "are unconstitutional and void because the purpose of said provisions was to enable the registrar of voters to discriminate against otherwise qualified Negroes, solely because of their race and color," and that said provisions were being administered by defendant Daniel "in such a manner as to discriminate against Reverend H. B. Darby and other Negroes otherwise qualified, solely because of their race and color." The document further contended that since plaintiff Darby had registered prior to January 1, 1954, the new provisions were not applicable to him.

4. This appearance by plaintiff Darby and his attorney resulted, no doubt, from the language of Section 3226 of the Mississippi Code of 1942 providing that the Commissioners should meet "on the first Monday in October after appointment." The Commissioners had been appointed in 1956 and had held the October meeting that year. No provision being made in that section for meeting in any year except that of their appointment, the Mississippi Legislature in 1938 passed a statute appearing as Section 3240 of the Mississippi Code of 1942 providing that: "On the Tuesday after the third Monday in March, 1939, A. D. and *every year thereafter* the commissioners of election shall meet at the office of the registrar . . ." (Emphasis added.)

our constitutional system, the qualification of voters is a matter committed exclusively to the States. The Supreme Court has spoken on the subject in language as clear as it is decisive. Witness, for example, what it said in Pope v. Williams, 1904, 193, U.S. 621:[5]

"The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. Minor v. Happersett, 21 Wall. 162. It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, *the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper* . . . The State might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in Minor v. Happersett, *supra* such persons were allowed to vote in several of the States upon having declared their intentions to become citizens of the United States. Some States permit women to vote; others refuse them that privilege. A State, so far as the Federal Constitution is concerned, might provide by its own constitution and laws that none but native-born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon any one, and the conditions under which that right is to be exercised *are matters for the States alone to prescribe,* subject to the conditions of the Federal Constitution, already stated; . . . . The *question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one.* . . .

". . . The right of a State to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution.

"The reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, and this court has no concern with them." (Pp. 632-634.) (Emphasis added.)

Like language was used by the Court in a case so much relied upon by plaintiffs, Guinn et al v. United States, 1915, 238 U.S. 347. In striking down the Grandfather Clause of the Oklahoma Constitution the Court fixed its eyes upon certain principles as the lodestar which should furnish the light by which it would be guided:

". . . It (the United States) says state power to provide for suffrage is not disputed, although, of course, the authority of the Fifteenth Amendment and the limit on that power which it imposes is insisted upon. Hence, no assertion denying the right of a State to exert judgment and discretion in fixing the qualification of suffrage is advanced and no right to question the motive of the State in establishing a standard as to such subjects under such circumstances or to review or supervise the same is relied upon and no power to destroy an otherwise valid exertion of authority *upon the mere ultimate operation of the power exercised is asserted.* And applying these principles to the very case in hand the argument of the Government in substance says: No question is raised by the Government *concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of state judgment and therefore cannot be here assailed either by disregarding the State's power to judge on the subject or by testing its motive in enacting the provision.* (Pp. 359-360.)

. . .

"Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning and *without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and the State would fall to the*

5. The Court was then composed of Chief Justice Fuller and Associate Justices Harlan, Brewer, Brown, White, Peckham, McKenna, Holmes and Day, and the decision was unanimous.

ground. In fact ,the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals." (P. 362.) (Emphasis added.)[6]

(2) Plaintiffs base their argument that the constitutional provisions under attack are void on their face chiefly upon four Supreme Court decisions: Yick Wo v. Hopkins, Sheriff, 1886, 118 U.S. 356; Guinn et al v. United States, *supra;* Lane v. Wilson, 1939, 307 U.S. 268; and Schnell et al v. Davis, 1949, 336 U.S. 933. Analysis of those cases will reveal that they do not apply to the constitutional and statutory provisions before us.

Yick Wo involved the constitutionality, as administered by the Board of Supervisors, of an ordinance of the City and County of San Francisco making it unlawful to establish or maintain a laundry without the consent of the board of supervisors unless such laundry "be located in a building constructed either of brick or stone." Two Chinese Nationals were convicted of violating the ordinances and the two cases wherein they sought habeas corpus were consolidated and decided by the Supreme Court. One was Yick Wo's petition for habeas corpus denied by the Supreme Court of California, and the other a like petition by Wo Lee, on practically identical facts, denied by the Circuit Court of the United States for the San Francisco District. The facts in both cases were without dispute.

Of the 320 laundries in San Francisco, about 310 were constructed of wood, and about 240 were owned and conducted by subjects of China. The board of supervisors followed the policy of issuing permits for laundry operation to all Caucasians and of denying it to all Chinese even though in the cases presented to the court the premises of the Chinese had been inspected and approved by the fire wardens, the health officers, and other city officials. The Supreme Court of California thought that the statute was a proper exercise of the police power, and the United States Circuit Court, in the other case, thought otherwise, expressing the opinion that the ordinances as administered violated provisions of the Fourteenth Amendment and a treaty between the United States and China. In deference to the decision of the Supreme Court of California, however, and contrary to its own opinion, the Circuit Court discharged the habeas corpus writ as the Supreme Court of California had done.

The Supreme Court rejected the decision of the California Court, holding that the ordinances "seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. . . . The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." (Pp. 366-367.) The final conclusion of the Supreme Court is epitomized in graphic words copied in the margin.[7] The quotation from the Supreme Court's opinion as applied to the facts there refutes the argument the case is called upon to furnish here. The case will be discussed further in our analysis of Schnell, *infra.* The Constitution and statutes of Mississippi do not contain any license for the

6. To the same effect see In Re Slaughterhouse Cases, 1872, 16 Wall. 36; Minor v. Happersett, 1874, 21 Wall. 162, 88 U.S. 162; United States v. Cruikshank, 1875, 92 U.S. 542; United States v. Reece, 1875, 92 U.S. 214; State of Virginia v. Rives, 1879, 100 U.S. 313; Snowden v. Hughes, 1944, 321 U.S. 1. And cf. McPherson v. Blacker, 1892, 146 U.S. 1, 35: "The question before us is not one of policy but of power . . .;" and Annotation 153 A.L.R. pp. 1066 et seq.

7. (Pp. 373-374) "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.
. . . "The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, . . . No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. *The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong,* and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. . . ." (Emphasis added.)

exercise of arbitrary power. Plaintiffs are entitled to relief here if they can show the discrimination which was admitted there.

[*Holding in* Guinn *Case*]

Guinn brought in question the constitutionality of the "Grandfather Clause" inserted by amendment into the Constitution of Oklahoma. That amendment established literacy tests, but exempted from such tests every person "who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, . . ." The exemption was made to apply also to the lineal descendants of such persons. The court held that the language of the Oklahoma amendment was indisputably aimed directly at the Fifteenth Amendment with the palpable intent of destroying the effect of that Amendment. Its course of reasoning ran thus:

The Fifteenth Amendment provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Oklahoma Constitution fixed a date, January 1, 1866, as the crucial date, at which time the Fifteenth Amendment had not been passed and no Negro possessed the right of suffrage. By its terms, therefore, the exemption from the literacy test was denied to all Negroes, and was vouchsafed to all others. This being true, the Oklahoma amendment—and the Supreme Court so stated—could have no other purpose, under its very language, than to abridge the right of Negroes to vote by requiring them to pass a literacy test from which all non-Negroes were exempted.

Lane v. Wilson dealt with an Act of the Oklahoma Legislature passed at a special session immediately following the invalidation of the constitutional amendment in Guinn, which Act the Supreme Court decided was directed solely at a circumvention of the Guinn decision. The scope and reach of Lane v. Wilson can best be evaluated by quotations from the Supreme Court's opinion set forth in the margin.[8]

It is clear that the Supreme Court thought that it was impossible to construe the Oklahoma legislation as having any efficacy which did not perpetuate as a favored class the white citizens, who were the only ones permitted to vote in 1914,[9] and to lay a heavy burden on Negroes aspiring to register under discriminatory requirements which they were forced to meet only because they had been wrongfully excluded from voting right under the unconstitutional provisions of the Grandfather Clause.

The last case relied upon by plaintiffs is the Per curiam opinion of the Supreme Court in Schnell et al v. Davis et al, which reads as follows:

> "The judgment is affirmed. Lane v. Wilson, 307 U.S. 268; Yick Wo v. Hopkins, 118 U.S. 356. Cf. Williams v. Mississippi, 170 U.S. 213. . . ."

A three-judge District Court for the Southern District of Alabama had written a lengthy opinion and had based its decision upon a number of grounds including a finding that the Boswell Amendment there under consideration "has, in fact, been arbitrarily used for the purpose of excluding Negro applicants from the franchise, while white applicants with comparable qualifications were being accepted."[10] From

8. "Those who had voted in the general election of 1914, automatically remained qualified voters. The new registration requirements affected only others. . . . The crux of the present controversy is the validity of this registration scheme, with its dividing line between white citizens who had voted under the 'grandfather clause' immunity prior to Guinn v. United States, supra, and citizens who were outside it, and the not more than twelve days as the normal period of registration for the theretofore proscribed class." (P. 271.)

"When in Guinn v. United States, supra, the Oklahoma 'grandfather clause' was found violative of the Fifteenth Amendment, Oklahoma was confronted with the serious task of devising a new registration system consonant with her own political ideas but also consistent with the federal Constitution. We are compelled to conclude, that the legislation of 1916 partakes too much of the infirmity of the 'grandfather clause' to be able to survive. (P. 275)

. . . . . .

"But this registration was held under the statute which was condemned in the Guinn case. Unfair discrimination was thus retained *by automatically granting voting privileges for life to the white citizens* whom the constitutional 'grandfather clause' had sheltered *while subjecting colored citizens to a new burden.*" (P. 276) (Emphasis added.)

9. In its decision of Lane v. Wilson the Circuit Court of Appeals for the Tenth Circuit, 98 F.2d 980, 984, stated: "It may be, and we take it as true, that inasmuch as the so called grandfather clause in the constitution of Oklahoma had not been declared void as violative of the Fifteenth Amendment until 1915 no Negroes voted at the 1914 election . . ."

10. Fundamental factual differences differentiate *Schnell* from the case before us. The Alabama amendment invested the registrars with rigid and arbitrary powers, not requiring that their judgment be "reasonable." It contained no requirement that the examination be in writing or that a record be made

the concluding words of the District Court's opinion [11] it appears that the judgment it entered was to grant an injunction in favor of Schnell et al. The Supreme Court did nothing more than to affirm that judgment, not indicating which of the several grounds it adopted as the basis for the affirmance.

[*Power of Registrars*]

Viewed most favorably to the contentions of the plaintiffs here, it would be assumed that the Supreme Court decided that the Boswell Amendment placed final and arbitrary powers in the hands of the board of registrars, which power the board had in fact exercised arbitrarily in favor of white applicants and against Negro applicants. As shown above, this was the ground common to Lane and Yick Wo, the two cases forming the predicate for the Supreme Court's action in Schnell.

It is important to note that the Supreme Court, after citing these two cases, directed a comparison with Williams v. Mississippi 1898, 170 U.S. 213. There, the literacy tests of the Mississippi Constitution of 1890 were upheld and, as demonstrated infra, the Court held categorically that the doctrine of Yick Wo did not apply. The clear meaning of the reference to the three cases by the Supreme Court was that in contrast with the valid requirements of the Mississippi Constitution, the Boswell Amendment involved in *Schnell* came under the condemnation of the two cases wherein the Supreme Court had pointed out specifically that arbitrary power granted and discriminatorily used could not stand the test of constitutionality.

II.

(1) In considering whether amended Section 244 is unconstitutional on its face, it is important to bear in mind that plaintiffs concede that the voting provisions of the Constitution of 1890 were valid. They could not, of course, do less because the Supreme Court of the United States specifically approved them in Williams v. Mississippi, 1898, 170 U.S. 213.[12]

Sections 241, 242 and 244 of the Constitution of 1890 were attacked by motion (20 So. at 340) as being violative of the due process and equal protection clauses of the Fourteenth Amendment. The motion was grounded on the allegation that the constitutional convention of Mississippi was composed of 134 members, of which only one was a Negro; "that *the purpose and object of said constitution was to disqualify* by reason of their color, race and previous condition of servitude, 190,000 Negro voters." It was contended before the Supreme Court, 170 U.S. at p. 215, that, "under prior laws, there were 190,000 colored voters and 69,000 white voters;" and "that Sections 241, 242 and 244 of the constitution of this state are in conflict with the Fourteenth Amendment to the Constitution of the United States, *because they vest in administrative officers the power to discriminate against citizens by reason of their color; and that the purpose of* so investing such officers with such power *was intended by the framers of the state constitution, to the end that it should be used to discriminate against the negroes of the state.*" (Emphasis added.) The contentions there made bear a marked resemblance to those now made before us. Responding to them the Supreme Court of Mississippi said (20 So. 840-841):

> "At this point in the investigation it is sufficient to say that we have no power to investigate or decide upon the private, individual purposes of those who framed the constitution, the political or social complexion of the body of the convention . . . *We can deal only with the perfected work—the written constitution* adopted and put in operation by the convention. . . .
>
> "We find nothing in the constitutional provisions challenged by the appellant which discriminate against any citizen by reason of his race, color, or previous conditions of servitude. . . . All these provisions, if fairly and impartially administered, apply

of it so that it might be subjected to review. The decision makes no mention of any right of appeal from the decision of the registrars. State agencies took active leadership in campaigning for its adoption, stating openly in writing that the object of the amendment was to curtail Negro registration. As applied, the tests were not required of whites, only Negroes being subjected to them. Not one of these criticisms applies to the Mississippi amendment under the facts presented to us.

11. 81 F.Supp. 881.

12. The Supreme Court there affirmed the decision of the Supreme Court of Mississippi in Williams v. State, 1896, 20 So. 1023, in which case a memorandum opinion only was written. That memorandum opinion referred to the decision of Chief Justice Cooper in the companion case of Dixon v. State, 20 So. 839; and consideration of the Dixon decision is necessary to an understanding of the effect of the Supreme Court's decision in Williams.

with equal force to the individual white and negro citizen. It may be, and unquestionably is, true that, so administered, their operation will be to exclude from the exercise of the elective franchise a greater proportionate number of colored than of white persons. *But this is not because one is white and the other is colored, but, because of superior advantages and circumstances possessed by the one race over the other, a greater number of the more fortunate race is bound to possess the qualifications which the framers* of the constitution deemed essential for the exercise of the elective franchise." (Emphasis added.)

Affirming the decision of the Mississippi Supreme Court in Williams, the Supreme Court of the United States considered at length Yick Wo v. Hopkins, *supra,* more than half of the opinion being devoted to a study of and quotations from that case. The Court quoted what it had said in Yick Wo, which quotation—set forth supra—is the portion of Yick Wo so vigorously urged by plaintiffs before us. But concerning said quoted language the Supreme Court of the United States, after stating "We do not think that this case is brought within the ruling of Yick Wo v. Hopkins," 170 U.S. at 223, said:

> "This comment is not applicable to the constitution of Mississippi and its statutes. They do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."

The Court, in that decision, quoted and discussed all of the important provisions of the Mississippi Constitution governing the right to vote, and also quoted the contention there made that the Constitution vested in the registrar "the full power, . . . to ask all sorts of vain, impertinent questions, and . . . reject whomsoever he chooses, and register whomsoever he chooses, for he is vested by the constitution with that power. Under section 244 it is left with the administrative officer to determine whether the applicant *reads, understands* or *interprets* the section of the constitution designated. The officer is the sole judge of the examination of the applicant, and even though the applicant be qualified, it is left with the officer to so determine; and the said officer can refuse him registration." (Emphasis supplied.)

It is of determinant significance that the Supreme Court in Williams rejected all of those contentions and upheld the constitutionality of Section 244 as originally written.

(2) It is pertinent to observe at this point that plaintiffs, having thus conceded the validity of the original 244, make the identical argument that amended 244 is unconstitutional because (a) its language is so vague and indefinite as to furnish no ascertainable standard of action, and (b) it invests the registrar with arbitrary and uncontrolled powers.

(a) The obvious answer to the ground first stated is that the words used in amended Section 244 are the identical terms used in the 1890 Constitution—"read," "reasonable," "interpret," "understand." Every one of those words was used in the original section which plaintiffs find no difficulty in comprehending. The language above quoted shows that the identical contention was made by Williams in his appeal and was rejected by the Supreme Court. It is further clear that the responsible state official was invested with exactly the same powers under the Constitution of 1890 that he has under the amended section.

[*Literacy Test*]

It is plain that what plaintiffs complain of is, not that the words used in the amendment are vague and indefinite, but that the literacy test imposed by the amendment is slightly more onerous and exacting than that of the original. They complain that the amendment requires an applicant for registration to read *and* write a section of the Constitution. Certainly the original requirement was more rigorous at the time of its enactment than was the amendment when it was adopted.

The Constitution of 1890 was passed when Negroes had just emerged from complete illiteracy—cf. the Supreme Court's language in Brown v. Board of Education, 1954, 347 U.S. 483, 490 "Education of Negroes was almost non-existent and practically all of the race were illiterate"—and when both Negroes and whites had passed through two decades of the tragedy of Reconstruction when efforts at education were close to the vanishing point. After six decades of an increasingly competent educational system[13] it seems moderate indeed for the electorate to lay

13. Last year 268,246 Negroes attended the public schools of Mississippi and 281,684 whites. See Bulletin S.D. 58, Mississippi Department of Education.

upon itself the obligation of being able to read and write the basic law of the Commonwealth. Understanding and interpretation formed a part of the original Section 244 and they seem all the more proper in this time of general enlightenment.

The same can well be said of the sentence added by the amendment requiring an applicant to demonstrate "a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government." In assaying the reasonableness of such requirements it is well to note that the provision of the Oklahoma Constitution, which the Supreme Court found unexceptionable in Guinn, *supra* (238 U.S. at 357), required the applicant to both read and write, and that the Court rejected the Grandfather Clause only because it was not able to discover any reason for its arbitrary exemption of those possessing certain qualifications on a specified date except one which flew in the face of the Fifteenth Amendment (238 U.S. at pp. 364-365). Such is not the case here. At a time when alien ideologies are making a steady and insidious assault upon constitutional government everywhere,[14] it is nothing but reasonable that the States should be tightening their belts and seeking to assure that those carrying the responsibility of suffrage understand and appreciate the form and genius of the government of this country and of the States.

(b) Literacy tests for prospective voters have been in effect in this country for a century, and no case has been brought before us holding that the people of a state have placed themselves under too heavy a burden in setting the standards which will earn the right to vote, and none condemning a literacy test as such. In Lassiter v. Taylor, U.S.D.C. E.D. N. Car., 1957, 152 F.Supp. 295, 297-298, attention is called to the fact that nineteen states, only seven of which are Southern states, prescribe literacy tests, and those states and the laws prescribing the literacy tests are listed. Plaintiffs concede that it is proper for Mississippi to enact reasonable literacy requirements for voting. That concession is bound to include the unquestioned concept that it is the states which have plenary and exclusive power to determine what is reasonable. See the language of the Supreme Court opinions in Part I supra. Plaintiff's idea that a literacy test may properly embrace one facet but not two (or two facets but not three) is without sanction of either law or reason. In Trudeau v. Barnes, 65 F.2d 563, certiorari denied 290 U.S. 659, the Fifth Circuit Court of Appeals approved Louisiana constitutional requirements embracing both reading and interpreting its Constitution and that of the United States.

(c) To attack the language of amended Section 244 as being too vague and indefinite is to ignore a long and unbroken line of decisions approving legislative enactments whose phraseologies are far more nebulous and difficult of ascertainment than the relatively simple terms before us. A few recent examples will suffice. The Supreme Court has recently[15] approved a federal and a state statute which made criminal the dissemination of literature which was "obscene, lewd, lascivious, filthy, indecent," although it was necessarily left to twelve laymen constituting the jury to determine whether such dissemination had "a substantial tendency to deprave or corrupt the readers by inciting lascivious thought or by arousing lustful desires." The Labor Board is given power[16] to examine protracted negotiations between representatives of employers and employees and to determine therefrom whether there has been "bargaining in good faith."

In Screws v. United States, 325 U.S. 91, the Supreme Court upheld a criminal statute making it unlawful to deprive any inhabitant of a state "of any rights, privilege, or immunities secured or protected by the Constitution or laws of the United States . . . by reason of his color or race." Those rights, privileges and immunities are legion and are being defined and expanded every day.[17] The Court justified its decision by holding that conviction under the statute can ensue only when the jurors find, under proper instructions, that the rights violated are rights belonging to federal citizenship as distinguished from those inhering in state citizenship. It should be remembered also that every juror in a criminal case is forced to apply his common sense in determining what is or is not a "reasonable" doubt; and jurors trying personal injury suits are required to fashion largely out of their own

14. Blazoned across the front of the October 3, 1958 issue of U. S. News & World Report are these words in red letters: "TODAY'S WAR—HOW THE REDS ARE OPERATING IN 72 COUNTRIES."

15. Roth v. United States, 1957, 354 U.S. 476.

16. Labor Board v. Truitt Mfg. Co., 1956, 351 U.S. 149.

17. In Adamson v. California, 332 U.S. 46, it is demonstrated by the four exhaustive opinions that the Judges of the Supreme Court differ radically as to what the quoted words mean.

experience standards of "reasonable" care and "reasonable" prudence upon which to base their verdicts.

(3) To charge that the discretion vested in the Registrar is arbitrary and uncontrolled is to ignore the procedures provided by Mississippi law. Administrative appeal to a board selected by the State Board of Election Commissioners is given *de novo* and, on such appeal, the judgment of the Registrar is so highly tentative and lacking in finality that it is not even prima facie correct. In every instance his judgment must be one based upon reason, and absolute right of appeal to the courts is also provided. This administrative machinery has the explicit approval not only of Williams, *supra*, but of Peay et al v. Cox, Registrar, 5 Cir., 1951, certiorari denied 342 U.S. 896.

It would be hard to conceive of constitutional provisions which safeguard the rights of applicants for suffrage as well as do the ones under attack. A permanent record is made on forms prepared by state officers and applying uniformly to all applicants, so that anything smacking of discrimination can easily be checked by examination of the public records. This provides a more certain insurance against discrimination than the requirements of original Section 244—providing for oral examination,—which bears the stamp of plaintiffs' approval. Right of appeal is given not only to rejected applicants but to any member of the public who may think that any applicant has been too generously dealt with.

(4) (a) In an attempt to prove that the "purpose," i.e., motive, of the people of Mississippi in amending Section 244 of the Mississippi Constitution was an evil one, plaintiffs sought to introduce in evidence six photostatic copies of newspaper articles expressing the opinion that the object of the constitutional amendment was "aimed at stemming the tide of Negro voters that is growing up in the state."[18] The amendment was voted upon at an election for various officials, state and federal. No effort was made to prove that the copies offered were in fact copies of newspapers published at the time and no proof was offered to show that the statements attributed to various individuals were made, or that the opinions were actually expressed.

These articles were permitted to be inserted in the record for whatever value they might have towards proving what the plaintiffs called "climate." No statements were attributed to state officers and the articles purported to express only sentiments which were alleged to be entertained by the private citizens to whom they were attributed. The articles possessed little, if any, probative value.

(b) Plaintiffs also obtained by subpoena copy of an issue of the Clarion Ledger, a newspaper published in Jackson, Mississippi, containing an article by Charles M. Hills in which the number of Negroes supposedly qualified and registered in various counties of the state was discussed. The article showed that Jefferson Davis County had, in 1954, 1,221 registered Negro voters. Hills was offered by plaintiff as a witness and asked as to the correctness of his figures. He replied that he had no personal knowledge at all and no information except what he had obtained, as the article set forth, from the Mississippi Citizens' Council. The figures could have been nothing but an estimate, as the registration records omit entirely any reference to the race of a registrant; but the article was received as a part of the record for whatever probative value it might have.

If the article should be accepted as dependable and as competent proof, some interesting comparisons might be made. In Jefferson Davis County 926 electors cast their ballots in favor of the constitutional amendment[19] and 278 against it. Plaintiffs' newspaper article showed that fifty-four Negroes were registered voters in Itawamba County; in voting on the amend-

18. Five of these were assumed copies of one daily newspaper, including two excerpts from editorials, two news stories about the impending election, and one news story about the formation of a Citizens' Council in a Mississippi county. Each contained the expression of the opinion that the amendment was intended to limit Negro registration. This quotation from one of the editorials is typical:

"The second proposed amendment would tighten up the state's voter-registration requirements to curb registration of near-illiterates. . . . The proposed change is wise, desirable and very timely. . . . Adoption of this amendment, and fair and uniform application of the new voter-registration requirements, over the years would steadily raise the average educational qualifications and intelligence of our citizens. It would also curb the registration of members of groups most likely to engage in 'bloc voting' and we believe that adoption of this amendment would, over a long period, help win the fight to retain our separate school system and social institutions . . ."

The remaining newspaper article was a news story in another newspaper dealing largely with activities of Citizens' Councils.

19. The figures are obtained from "Mississippi Official and Statistical Registrar, 1956-1960," page 397.

ment, 228 citizens of that county voted for the amendment and 1248 voted against it. The artical reflected that 4 Negroes were registered in Pontotoc County; the vote in that county was 399 for the amendment and 1371 against. Speculation engendered by the article would lead to the conclusion that the adoption of the amendment by well over a two to one majority statewide did not follow at all the pattern of race registration which plaintiffs attempt to ascribe to it.[20]

(c) Plaintiffs, pursuing further the argument that the "purpose" of amending Section 244 was to fashion tools the better to discriminate against Negro applicants, list a number of statutes passed by the Mississippi Legislature in 1954, 1955 and 1956 dealing with the public schools and with other aspects of what plaintiffs term "the state's declared policy of preserving segregation. If we should be tempted to accept "guilt by association" as a proper basis for condemning state action, it would not apply here, because the attack plaintiffs make here is basically upon a constitutional amendment enacted by vote of the people themselves. It was submitted at a time when only one other amendment was on the ballot and that had to do with a technical point applying to corporate procedures. The argument, like those which precede it, is lacking in force.

(5) (a) Having failed to produce any tangible proof to sustain this position, plaintiffs finally call upon us to supply the lack by judicial notice. In other words, we are importuned to rule without proof that, on its face or by reason of its unrevealed sinister "purpose," the constitutional amendment is void. The showing before us wholly fails to warrant serious consideration of so condemning a whole people, which is what we would have to do if we accepted plaintiffs' argument. Neither proof nor judicial knowledge tend to sustain plaintiff's position.

Even if we had such knowledge by some sort of occult power of divination, we would not have the competence to do what plaintiffs advocate. No case is cited as a precedent for such action, and no proof is offered to sustain it. If we should imagine ourselves possessed of such omniscience and omnipotence, we would find ourselves confronted by a vast array of authority which forbids questioning the motives even of a legislature, certainly of a sovereign people.

(b) Commenting upon the immunity of state legislators from having their motives scrutinized, Judge Learned Hand[21] exclaims: "but of all conceivable issues this would be the most completely 'political,' and no court would undertake it."[22] He also quotes Chief Justice Taney's statement in "The License Cases," 5 How. 504, 583: "Upon that question the object and motive of the States are of no importance, and cannot influence the decision. It is a question of power." Mr. Justice Douglas, in Fernandez v. Wiener, 326 U.S. 340, 401, quoted the language of Chief Justice Stone in Sonzinsky v. United States, 1937, 300 U.S. 506, 513: "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally cenferred upon it is beyond the competency of the courts." Upon a principle so unquestionable it is sufficient to add to the cases already cited a list of more recent decisions affirming it.[23]

We hold, therefore, that plaintiffs have wholly failed to establish that the amendment to Section 244 of the Mississippi Constitution of 1890 is void on its face or because it was the product of base motives. We hold, on the other hand, that said amendment and the statutes passed in connection with it are valid on their face and in fact, and are a legitimate exercise by the State of its sovereign right to prescribe and enforce the qualification of voters.

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20. Plaintiffs seek to draw an unfavorable inference against defendants from the fact that Governor Coleman declined to honor a subpoena issued by them. This was in keeping with the general law and the traditional policy of governors in Mississippi and in states generally. The Court offered to have Mr. Patterson, a member of the same Commission with the Governor, submitted to examination by plaintiffs, but plaintiffs did not choose so to proceed. It was clear that the testimony which plaintiffs sought to elicit from the Governor was hearsay and undependable because the figures were derived from a letter poll made of registrars which turned out to be incomplete. Plaintiffs had ample opportunity to attempt to make the desired proof by the Registrar of Jefferson Davis County in 1954, or to proceed by interrogatories, request for admission, or the other avenues provided in F.R.C.P., but they did not do so.

21. "The Bill of Rights," supra, p. 46.

22. Citing McCulloch v. Maryland, 4 Wheat, 316, 423; Doyle v. Continental Ins. Co., 94 U.S. 535, 541; Weber v. Freed, 239 U.S. 325, 330; Arizona v. California, 283 U.S. 423, 435; Daniel v. Family Insurance Co., 336 U.S. 220, 224.

23. Cohen et al v. Beneficial Industrial Loan Corp., 1949, 337 U.S. 541, 552; Goesaert v. Cleary, 1948, 335 U.S. 464, 467; Oklahoma ex rel Phillips v. Atkinson, 1940, 313 U.S. 508, 528; United States v. Darby, 1941, 312 U.S. 100, 115; Child Labor Case, 1922, 259 U.S. 20, 39; Daniel v. Family Insurance Co., 336 U.S. 221; and Doyle v. Continental Insurance Co., 94 U.S. 535.

III.

(1) This brings us to the contention that plaintiffs, along with other Negroes, were actually discriminated against in the administration of the Constitution and laws of Mississippi by defendant Daniel. If such discrimination was practiced against plaintiffs, the actions of defendant would certainly come under the condemnation of the Fifteenth Amendment, or the Fourteenth Amendment, or both. Plaintiffs put on the witness stand a number of other Negroes, but we look first to their own testimony to determine if either plaintiff proved that he was qualified to register under the Constitution and laws of Mississippi and was denied registration because of his race.

Plaintiff Dillon, conceding that she was properly given the written test provided by the amendment, failed to produce a copy of that test for the Court's inspection. She did not demonstrate in her oral testimony the possession of the qualifications provided in the Mississippi Constitution and statutes, and there is no proof at all, therefore, that she had any status to maintain this action.

According to the testimony of his attorney, plaintiff Darby approached him in April or May, 1956, about the time he wrote President Eisenhower. The attorney called the N.A.A.C.P., which, sometime later, agreed that its Legal Fund would pay the attorneys and the expense of any litigation which might be brought by Reverend Darby.

This was before his first written application of June 29, 1956, in which he stated that he was a farmer. The application was signed by him but was not filled in. It is not claimed that, in this application or the oral tests which came after it, plaintiff Darby showed himself qualified to register. The entire case is predicated on the sworn written application of June 22, 1957, which he took under his attorney's advice and direction. This document, read in the light of the testimony of plaintiff Darby, reveals several deficiencies.

He made no answer to Question 14 inquiring if he had ever been convicted of the crimes enumerated in the question; considerable portions of the answers written by plaintiff are illegible. In response to Question 18 calling upon him to copy Section 123 of the Constitution of Mississippi,[24] he wrote six lines not called for by the question and not possessing marked coherence. In giving his reasonable interpretation of that section he wrote, "the govenner govends all the works of the state and he is to see that all the voilatores be punished and als he can pardon out the penetenter ane pherson." In answering Question 20 which directed him to write his understanding of the duties and obligations of citizenship under a constitutional form of government, he wrote five lines which could hardly be called accurate or responsive to the question.[25]

[*Legibility Evidence*]

That he could not write legibly is exemplified by examination of the several documents in the record written by him, and is further attested by the fact that the letter he sent the president was written entirely by someone else, including the signature. He did not attempt, while on the witness stand, to demonstrate that he could read. Every other Negro witness he placed on the stand was given a section of the Mississippi Constitution to read before the Court, but plaintiff himself did not attempt to show his ability to read. The evidence does not, therefore, support the burden imposed on the plaintiffs to show that they were qualified to be registered as voters. *A fortiori* it does not establish that defendant Daniel did not act in good faith or exercise a sound discretion when he made his decision that plaintiffs had not passed the examinations given them.

In passing judgment on this phase of the case we cannot leave out of view that defendant Daniel knew that he was under surveillance by federal officials and that he was dealing with one party who was acting under advice of counsel.

It is fundamental that plaintiffs must stand or fall on the merits of their own case. The Supreme Court stated the principle in McCabe v. A. T. & S. F. Ry Co., 1914, 235 U.S. 151, 162, in these words:

> "But we are dealing here with the case of the complainants, and nothing is shown to entitle them to an injunction. It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly ap-

24. "The Governor shall see that the laws are faithfully executed."

25. "a citizen is persn has in been in the USA all his days. and is not been convicted of enny crimes and has been Loyal. to his country and pase all his tax."

pear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons, who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention." (Citing a number of Supreme Court cases.[26])

(2) Plaintiffs served subpoenas on twenty-five Negro witnesses, of whom fifteen were placed upon the stand. Despite the principles last above quoted and such cases as Reddix v. Lucky, (5 Cir., 1958) 252 F.2d 930, 938, holding that "obviously the right of each voter depends upon the action taken with respect to his own case," we permitted this testimony to be introduced over objection to give plaintiffs a chance to show that there was a class whose rights they might carry if they established their own case, and also that the testimony might be considered as furnishing circumstantial evidence of discrimination in favor of the case of plaintiffs. Although some of the written applications exhibited in connection with the testimony of these witnesses were sufficient to raise an issue of fact as to their qualifications, it is not our province to set ourselves up as registrar of voters.

[*Qualifications Absent*]

Some of the testimony certainly demonstrated the absence of qualifications of the applicants. For example, when called upon by Question 18 to copy Section 198 of the Mississippi Constitution, Johnnie B. Darby, plaintiff Darby's wife, wrote: "I have so agreed to be as good a citizen as I possible can I have not yet read the Constitution of Mississippi I do try to abide by truth and right as the almighty god privide the understanding and wisdom."

Another witness called upon to copy Section 16 of the Constitution[27] wrote: "Ex post facto laws or laws impaitring obligations contrace St. Shall Be passed." Interpreting that section this same witness wrote: "a man must pay pold tax befor he eagable to voat." This witness gave his occupation as that of teacher.

[*None Took Appeal*]

None of these witnesses took appeals from Daniel's ruling declining to permit them to register. Four of the fifteen passed the written examination, and of those who failed, the wives of two passed. He gave the test to some of the witnesses as many as four times and he invited plaintiff Dillon to come back and try again. The testimony of these witnesses adds little to the solution of the problem before us.

(3) Plaintiffs introduced one bound volume containing seventy-eight original applications. The documents do not show whether the applicants were white or colored. It seems probable that the purpose of introducing this volume was to show that, during this period, all applicants were required to take the written examination, whereas under the constitutional amendment those who were registered voters on January 1, 1954 were required to take only the oral test habitually given under the original Constitution. This does not prove anything which was not readily admitted by defendant Daniel. From the time Daniel came into office January 1, 1956, until the Attorney General of Mississippi advised him of his error, he had been using the forms furnished him by the State Election Commissioners and testing all applicants by written examination. As far as the testimony goes none had objected. The point of this testimony, however, is that undisputedly white and colored were treated exactly alike. Since, according to the undisputed proof, there were only forty to fifty Negro voters registered in the county, the seventy-eight applicants, all of whom passed, necessarily included some white people.

The wrongful interpretation or the misapplication of Mississippi law alone would not give this Court jurisdiction or amount of deprivation of

26. The cases on the subject are collected in an opinion by Chief Judge Hutcheson of the Court of Appeals of the Fifth Circuit in Brown v. Board of Trustees, 1951, 187 F.2d 20, 25, where he quoted from several Supreme Court cases. This language is applicable to the case before us: "All of these considerations, however, are completely beside the mark here, for plaintiff has wholly failed to plead or prove any deprivation *of his civil rights* and it is elementary that *he has no standing to sue for the deprivation of the civil rights of others*. . . .

"It is the individual who is entitled to the equal protection of the laws, and if he is denied . . . a facility or convenience . . . which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

. . .

"Cf. Sweatt v. Painter, 339 U.S. 629, 635, 70 S.Ct. 848, 851, where the court said: 'It is fundamental that these cases concern rights which are personal and present. . . . 'petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, . . .'"

27. "Ex post facto laws, or laws impairing the obligation of contracts, shall not be passed."

any constitutional rights. Under this phase of the case discrimination alone resulting from the fact that plaintiffs are Negroes can justify maintaining the action or granting the relief sought. The Supreme Court announced the principle in explicit terms in Snowden v. Hughes, et al, 1944, 321 U.S. 1, 8, (a case in which Williams v. Mississippi, *supra,* was cited with approval) where the dismissal of an action for want of jurisdiction was approved where a candidate for office sought equitable relief against party officials who refused to certify him as a candidate. The language quoted in the margin controls here.[28]

[*Discrimination by Daniel Is Key*]

The essence of the action before us, therefore, is discrimination on the part of the defendant Daniel,—discrimination against plaintiffs, Negroes, and in favor of white persons. After listening to the oral testimony and examining the documents carefully we are unable to find any tangible or credible proof of discrimination. There is no proof that any white person was ever treated in any manner more favorably than plaintiffs or any other Negroes. The mere showing that of 3,000 qualified voters in Jefferson Davis County, only forty to fifty are Negroes is not sufficient. Plaintiffs carry the burden of showing that plaintiffs have been denied the right to register because they are Negroes, and that white people similarly situated have been permitted to register. This record contains no such proof. The disparity between numbers of registrants, as has been so often pointed out, results doubtless from the fact that one race had a start of several centuries over the other in the slow and laborious struggle toward literacy. This record does not, in our opinion, show that defendant has practiced discrimination. From our observation of his demeanor during the trial and while on the witness stand and of the evidence generally we are convinced that he has shown himself to be a conscientious, patient and fair public official, exerting every effort to do a hard job in an honorable way.

IV.

Plaintiffs aver in their complaint that they have a right to maintain this action without exhaustion of the administrative remedies provided under Mississippi law. They base this contention upon the provisions of 42 U.S. Code Annotated, #1971(d), upon their charge that "where the plaintiff challenges the constitutionality of a state statute or policy, a federal court will not require the exhaustion of administrative remedies;" and upon their assertion that "plaintiff here seasonably attempted to exhaust his administrative remedies and was unable to obtain a decision by the Board of Election Commissioners." These contentions will be discussed in reverse order.

(1) Mississippi's election machinery is under the supervision of the State Board of Election Commissioners consisting of the Governor, the Secretary of State and the Attorney General.[29] This Board is required,[30] "Two months before every general election of representatives in Congress, and of electors of president and vice-president of the United States, . . . (to) appoint the commissioners for each county . . ." The absolute right of appeal to the county board is given in words reproduced in the margin.[31] Hearings on appeal are provided for by #3227 of the Mississippi Code (appearing first in the Mississippi Code of 1892) entitled "Appeal Heard De Novo:"

> "All cases on appeals shall be heard by the boards of election commissioners de

28. "But not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another. . . . And where the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection *unless there is shown to be present in it an element of intentional or purposeful discrimination. . . . But a discriminatory purpose is not presumed, Tarrance v. Florida,* 188 U.S. 519, 520; *there must be a showing of 'clear and intentional discrimination,' Gundling v. Chicago,* 177 U.S. 183, 186; . . ." (Emphasis supplied.)

29. Mississippi Code 1942, No. 3204.

30. Ib. No. 3205.

31. Ib. No. 3224 provides that: "Any person denied the right to register as a voter may appeal from the decision of the registrar to the board of election commissioners by filing with the registrar, on the same day of such denial or within five days thereafter, a written application for appeal."

No. 3225 provides: "Any elector of the county may likewise appeal from the decision of the registrar allowing any other person to be registered as a voter; but before the same can be heard, the party appealing shall give notice to the person whose registration is appealed from, in writing, stating the grounds of the appeal; which notice shall be served by the sheriff . . ."

> novo, and oral evidence may be heard by them; and they are authorized to administer oaths to witnesses before them; and they have power to subpoena witnesses, and to compel their attendance; to send for persons and papers; to require the sheriff and constables to attend them and to execute their process. The decisions of the commissioners in all cases shall be final as to questions of fact, but as to matters of law they may be revised by the circuit and Supreme Courts. The registrar shall obey the orders of the commissioners in directing a person to be registered, or a name to be stricken from the registration books."

Sections 3228, 3229, 3230 and 3231 provide for hearing of the appeal by the circuit court of the county. The right of appeal to the Supreme Court is given.

The evidence does not show that plaintiff Darby "was unable to obtain a decision by the Board of Election Commissioners." It does show that he seasonably appealed to the County Board of Election Commissioners, thus electing to proceed by statutory appellate procedures, but that he failed to follow them through. On the other hand, he began this civil action four days before the first meeting of the Board held after his appeal. The appeal is still pending and undisposed of.[32] Plaintiffs' first assigned reason is, therefore, without merit.

[*Contention Not Sustained*]

(2) The cases cited by plaintiffs[33] do not sustain their contention that it is not necessary to exhaust administrative remedies where the claim is asserted that constitutional rights have been violated. There are decisions[34] holding that, where an appeal presents only matters of law, the court may intervene without awaiting action by the intermediate administrative board which had no power to pass upon legal questions. But such cases do not control here. The written appeal of plaintiff Darby on June 24, 1957 was a general appeal, and the writing which accompanied it, states that he had on June 22, 1957 presented himself to the Registrar, making application to register as a voter "whereupon such instance notwithstanding that I did then and do now possess the necessary qualifications to register, I was denied registration." A letter from his attorney dated September 21, 1957 states that "He has been denied the right to register to vote, notwithstanding that he was then and is now possessed with the necessary qualifications for same." The formal "Contentions" filed by said plaintiff October 7, 1957 raised constitutional questions, but also reiterated the questions of fact theretofore relied upon, to-wit: that defendant Daniel was administering the constitutional and statutory provisions of Mississippi in such a manner as to discriminate against him, and that he was a duly qualified and registered voter in Mississippi prior to January 1, 1954, and was entitled to registration without complying with the additional qualifications contained in the amendment to the Constitution. In this state of the record and under the complaint, it is clear that plaintiff's challenge did not relate to questions of law only. We repeat what the Court of Appeals for the Fifth Circuit said in Peay v. Cox, *supra*:[35] "The Commissioners are sworn officers and presumably will give them a fair hearing. They may easily think the petitioners are right in their construction of the Mississippi Constitution . . . If they hold otherwise on that point but that a discrimination is practiced, they may

32. Meetings of the Board are fixed by three Mississippi Statutes: Section 3239 of the Mississippi Code of 1942, first passed in 1880, provides for a meeting "On the first Monday of October preceding a general election, and five days before any other. . . ." There was no general or other election in Mississippi during 1957. Section 3226 first passed in 1892, provides for meetings on the first Monday in October after appointment. The reason for this statute is that the time of appointment of the Board is indefinite under Section 3205, *supra*. The Board had been appointed in 1956 and had held a meeting in October of that year. This statute does not apply to any year except the year of their appointment.

The Mississippi Legislature of 1938 passed a new statute, now Section 3240 of the Code, requiring that the Board meet every year on the Tuesday after the third Monday in March, and this is the general meeting. The statutes provide an understandable and reasonable time for the meeting of the Board so that an elector desiring to register may not miss any election, and plaintiff and his attorney were advised by the statutes and by word of the Registrar of the date the Board would meet. Instead of attending the meeting of the Board and prosecuting the appeal they had begun, they filed this civil action.

Plaintiff Rutha Dillon testified that she did not appeal at all.

33. E.g., Gibson v. Board of Public Instruction of Dade County, 5 Cir., 1957, 246 F.2d 913, which holds premature the contention that school children did not pursue administrative remedies where the Florida Constitution made nonsegregated schools illegal.

34. E.g., Bruce et al v. Stilwell et al, 5 Cir., 1953, 206 F.2d 554.

35. 1951, 190 F.2d 123, 126, certiorari denied 342 U.S. 896.

correct that. The Registrar is bound to obey them." The second ground asserted by plaintiffs is, therefore, untenable.

(3) Finally, plaintiffs claim to be exempted from Mississippi procedural laws relating to registration and appeal therefrom, basing their contention upon the Act of Congress approved September 9, 1957, Public Law 85-315, Part IV, Section 131 (d).[36] Plaintiffs would construe the words "shall have exhausted any administrative or other remedies that may be provided by law" as permitting interception of the state remedy of appeal already begun and carried through by Darby to a point just short of hearing before the County Commissioners; and as relieving plaintiff Dillon of having taken the first step towards appeal, or having made any move at all until more than two years after her application had been rejected by the Registrar.

The mechanics set up by Mississippi to determine which applicants are qualified to register embrace three steps: Written application, which is passed upon by the Registrar; appeal from his ruling by the applicant or any other citizen and full hearing before the County Board; and appeal to the Circuit Court of the county. The Court of Appeals for the Fifth Circuit, in Peay v. Cox, Registrar, 190 F.2d at p. 126, certiorari denied 342 U. S. 896, classified even the step carrying the controversy before the courts as administrative under the authority of Federal Railroad Commission v. General Electric Co., 281 U.S. 464. To short-circuit the admittedly administrative proceedings short of a hearing and decision by the County Board would be not only to deny exhaustion of administrative remedies, but to stop them before they had begun. Such a conclusion is compelled if two key words of the new federal statute, "remedy" and "exhaust," are given their normal meaning.

[*Meaning of "Exhaust"*]

Exhaust[37] means to use up, to expend completely. Remedy[38] is defined as "something that corrects, counteracts or removes an evil or wrong; relief; redress." To sustain plaintiffs' position would be to shut off all state action aimed at providing a remedy, at redress. But the words of the statute contemplate that the state be given a chance to "correct" the asserted "wrong." It is difficult to perceive how these words of the statute can be given any efficacy at all or how the constitutional scheme can be fulfilled if federal competence is to be construed as displacing state power in this vital field before the state is permitted to take the first step towards furnishing an administrative "remedy."

The meaning of the quoted words must be determined in the light of state and federal competence as established by the Constitution as construed by the Supreme Court. In balancing the rights of a plaintiff to the protection of the Constitution and the power of a state over suffrage, it is well to keep in mind what the Supreme Court said in Guinn, *supra*, to the effect that "without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rests would be without support and both the authority of the nation and state would fall to the ground." The state of Mississippi had plenary and exclusive power to fix the qualifications of voters. More than that, it had and must have the power to provide machinery for its enforcement. The machinery provided by it contemplates the relatively ministerial act of registration by the registrar. The heart of Mississippi's machinery lies in the right of any person to appeal to the County Election Commission. That body alone has the power to have a hearing, to consider evidence, to give the time and study incident to a considered conclusion. Its findings and orders are absolutely binding upon the registrar. To take from this administrative scheme the duties conferred on this Board would be to render sterile the undoubted exclusive power of a state over suffrage.

[*Exhaustion Requirements*]

The Supreme Court of the United States has throughout its history recognized the rule that administrative proceedings must be exhausted, and it has been particularly punctilious in requiring the exhaustion of administrative remedies provided by the states.

We are confronted here with the necessity of deciding the point at which a federal court would be warranted in interrupting administrative procedures,—that is, what the statute under

36. The section now codified as 42 U.S.C.A. No. 1971 (d) reads as follows: "The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have *exhausted* any administrative or other *remedies* that may be provided by law." (Emphasis added.)
37. Webster's New World Dictionary, p. 509.
38. Ib. p. 1230.

consideration means by exhaustion of administrative remedies. The Supreme Court, in handling an action for declaratory judgment in a district court under the Renegotiation Acts, used this language concerning administrative remedies, affirming the act of the district court in declining jurisdiction:[39] "Ordinarily of course issues relating to exhaustion of administrative remedies, as a condition precedent to securing judicial relief, and to the existence of jurisdiction in equity are either separate or separable matters, to be treated as entirely or substantially distinct. The one generally speaking is simply a condition to be performed prior to invoking an exercise of jurisdiction by the courts. The other goes to the existence of judicial power in the basic jurisdictional sense. . . .

". . . The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention."

[*Regard for State Remedies*]

The solicitude habitually manifested by the Supreme Court in its traditional dealing with state matters before administrative agencies is well illustrated by the language used in Alabama Public Service Commission et al. v. Southern Railway Company, 1951, 341 U.S. 341, 349-350: "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extra-ordinary relief of an injunction in the federal courts.' Considering that '(f)ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts."

And in Hecht Co. v. Bowles, 1944, 321 U.S. 321, 329-330, the Court upheld the refusal of a District Court to grant an injunction using this language: "We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.

> ". . . We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. . . .
>
> ". . . Neither body (that is, administrative and court) should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, . . ."

It seems reasonable that, as applied to the Mississippi statutes under the facts of this case, the exhaustion of administrative remedies provided in the quoted federal statute should, in any event, be held to exist only after the appellate proceedings before the County Election Commissioners have been completed. Such a course would give full protection to the rights of plaintiffs, affording them remedy in the federal courts at the point where the administrative process is by Mississippi statutes committed to the courts. That is consistent with the holding of the Supreme Court in Lane v. Wilson, *supra:*[40] "To vindicate his present grievance the plaintiff did not have to pursue whatever remedy may have been open to him in the state courts. Normally, the state legislative process, sometimes exercised through administrative powers conferred on state courts, must be completed before resort to the federal courts can be had. . . . But the state procedure open for one in the plaintiff's situation . . . has all the indicia of a conventional judicial proceeding and does not confer upon the Oklahoma courts any of the discretionary or initiatory functions that are characteristic of administrative agencies. . . . Barring only exceptional circumstances, . . . resort to a federal court may be had without first exhausting the judicial remedies of state courts."

39. Aircraft & Diesel Corp. v. Hirsch, 1947, 331 U.S. 752, 764 and 767; and cf. United States v. Abilene & So. Ry. Co., 265 U.S. 274; United States v. Sing Tuck, 194 U.S. 161; and Gonzales v. French, 164 U.S. 338.

40. 307 U.S. at 274.

The exercise of such a discretion comports with the holdings of a long line of decisions of the Supreme Court.[41] And compare the language and action in Lane, *supra*, with that in Alabama Public Service Commission, *supra*.

We think the foregoing reasoning is sound, but we do not have to rest this phase of the decision upon it because it is quite clear that this case is not governed by the quoted provisions of the Act of September 9, 1957. By its terms it applies only to "proceedings instituted pursuant to this section." Subsection (d) appears as a part of the Civil Rights Act of 1957 bearing the heading: "Sec. 131." That section creates procedures theretofore unknown and vests the Attorney General of the United States with power to institute legal proceedings for private individuals. It is manifest that Subsection (d) applies only to actions so instituted. It follows that plaintiffs cannot maintain this action for the additional reason that they failed to pursue the reasonable and adequate administrative remedies provided by Mississippi law.

V.

Plaintiffs attack the constitutionality of the Mississippi statutes covering champerty and maintenance, Section 2049-01 through Section 2049-08 of the Mississippi Code of 1942, this portion of the action being directed chiefly against defendant Patterson, Attorney General of Mississippi. The complaint alleges that the defendant Attorney General threatens to enforce as against the plaintiffs and their attorneys the provisions of these statutes and that, as the result of said threats, plaintiffs and their attorneys are suffering irreparable injury. Plaintiffs' evidence wholly failed to sustain these charges of the complaint. In fact, that evidence showed without dispute that no such threats had been made and that no action was taken or within contemplation which could in any way affect the welfare or the rights of plaintiffs or their attorneys. The statutes have not been passed upon by the courts of Mississippi. Since the evidence fails to establish that any controversy exists between plaintiffs and either defendant with respect to said statutes, and in view of the long line of Supreme Court decisions committing such matters at least primarily to state court action, Amalgamated Clothing Workers of America v. Richmond Bros., 348 U.S. 511; Stefanelli v. Minard, 342 U.S. 117; Douglass v. City of Jeanette, 319 U.S. 157; and Watson v. Buck, 313 U.S. 387, and cf. 28 U.S.C.A. #2283, plaintiffs cannot maintain this phase of their complaint.

It results from the foregoing views that plaintiffs are not entitled to any of the relief sought. We are, therefore, entering an order dismissing the complaint.

DISMISSED.

41. Burford et al v. Sun Oil Co. et al, 1943, 319 U.S. 315; Railroad Commission of Texas v. Pullman Co., 1941, 312 U.S. 496; Meyers v. Bethlehem Shipbuilding Corp., 313 U.S. 41; Prentis et al v. Atlantic Coast Line Co. etc. 1908, 211 U.S. 210, and cases cited. And see also Peay v. Cox, *supra;* Cook v. Davis, 5 Cir., 178 F.2d 595; and Bates v. Batte, 5 Cir., 187 F.2d 142.

EMPLOYMENT
Labor Unions—Federal Statutes

Lee OLIPHANT et al. v. BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN et al.

United States Court of Appeals, 6th Circuit, November 26, 1958, 43 L.R.R.M. 2159.

SUMMARY: Several Negroes employed as firemen by various southern railroads brought an action in federal district court against the Brotherhood of Locomotive Firemen and Enginemen and some of its local unions. The Brotherhood is certified as exclusive bargaining representative for the firemen under the federal Railway Labor Act but does not admit Negro firemen to membership in the union. The action sought to require the admission of the Negro firemen to membership on the ground that discriminatory representation by the Brotherhood of the Negro firemen deprived them of liberty without due process of law in violation of the

Fifth Amendment to the United States Constitution. The court stated that discrimination, if it existed, resulted from policies of the railroad employers, who were not parties to the suit. It held that the Railway Labor Act does not prevent discrimination on the basis of race in admission practices of unions certified as bargaining representatives under the Act; that the certification of the Brotherhood under the Act does not constitute the Brotherhood a federal agency; and that the failure to prevent such discrimination is not "federal action" so as to be a deprivation of liberty or property without due process of law under the Fifth Amendment. The court stated that the plaintiffs' remedies are legislative rather than judicial and denied the relief requested. 156 F.Supp. 89, 2 Race Rel. L. Rep. 1128 (N.D. Ohio 1957). The Supreme Court denied certiorari. 355 U.S. 893, 3 Race Rel. L. Rep. 6 (1957). On appeal the Court of Appeals for the Sixth Circuit affirmed the district court decision.

Before Martin and Miller, Circuit Judges.

PER CURIAM:

Appellants are Negro firemen who brought suit in the United States District Court for themselves and others similarly situated, seeking admission to membership in the Brotherhood of Locomotive Firemen and Enginemen whose constitution limits membership to applicants "white born." This appeal is from an order of the United States District Court denying the relief requested, for the reason that sufficient federal action was not present to subject the membership policies of the Appellee Brotherhood to judicial control. The opinion of the district court may be found at 156 F.Supp. 89; certiorari denied, 355 U.S. 893.

The Brotherhood is and for many years has been designated, in accordance with the Railway Labor Act [45 U.S.C.A. 151, et. seq.], as the statutory bargaining representative for the locomotive firemen, hostlers, and hostler helpers, hereinafter collectively referred to as "firemen". A Negro fireman cannot become a member of the Brotherhood under existing provisions of the Brotherhood's Constitution, nor may any firemen who are not members of the Brotherhood attend meetings of its local lodges.

[*Appellants' Hypothesis*]

Appellants advance a double-barreled hypothesis, which roughly parallels the two judicial approaches to racial segregation in public education. Their first argument is that, inasmuch as racial exclusion from public schools is inherently a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment [Brown v. Board of Education, 347 U.S. 483 (1954)] and of due process of law guaranteed by the Fifth Amendment [Bolling v. Sharpe, 347 U.S. 497 (1954)] it follows that denial of membership in the duly elected statutory bargaining representative, based upon race, is inherently incompatible with the rights afforded by the Fifth Amendment to the Constitution of the United States and by the equal protection and equal representation guaranteed to them by the doctrine of Steele v. Louisville and Nashville Railroad Co., 323 U.S. 192. There, the Supreme Court held that "the language of the [Railway Labor] Act * * * read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them * * *." [323 U.S. 192, 202-3]. In short, appellants' first argument is that, as a matter of law, their constitutional rights and those enumerated in the Steele case are denied them as long as they are ineligible for membership in the exclusive collective bargaining agency which undertakes to represent their craft. They state in their brief: "Denial of voice and vote in the election of bargaining representatives and the formulation of bargaining objectives in and of itself denies Negro firemen equal representation."

If denial of membership in the Brotherhood is held to be not in violation of their rights as a matter of law, appellants assert that they are entitled to membership on a second and alternative ground. Cases decided under the earlier "separate but equal" doctrine of public schooling proscribed racial exclusion where in fact equal schooling was denied. See Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sweatt v. Painter, 339 U.S. 629 (1950). Analogizing their case to the stated doctrine, these appellants assert that the Brotherhood is in fact guilty of discriminatory practices and that the removal of the racial barrier to Brotherhood

membership alone will afford them some measure of relief from discrimination.

In his carefully considered opinion, Chief Judge Paul Jones decided the facts pertaining to discrimination adversely to the contention of appellants. He stated the position of the Negro firemen to be that the "Brotherhood continues to exercise discrimination in its representation, particularly in (1) reducing the minimum mileage requirements for firemen, which has the effect of reducing the monthly income of the Negroes; (2) applying the 'gouge' rule in such a way as to reduce earnings of the Negroes; (3) applying the mileage rules to firemen and not to demoted engineers; and (4) bargaining for a compulsory retirement at age 70." The Judge continues: "* * * these alleged acts of discrimination will not be discussed in detail, but it should be noted that as to (3) above, proof was mainly in the form of opinion and was denied by Brotherhood officials, while (1), (2) and (4) are legitimate practices used by most unions for reasons other than discrimination, and since they apply to all who come within the terms of the rule involved, whether the individuals are white or colored, this court cannot state definitely that this Brotherhood adopted these practices for the purpose of discriminating against the Negroes." 156 F.Supp. 89, 90.

A meticulous examination of the detailed record in this case has been made by us, resulting in our opinion that the above findings of the district court are eminently correct and are supported by substantial evidence. There is, therefore, no occasion for further consideration of appellants' second argument.

[*"Inherent Denial" Considered*]

Accordingly, we address ourselves solely to the contention advanced by the appellants that exclusion from membership in their collective bargaining representative based upon race is inherently a denial of their rights as a matter of law.

The appellee's authority as collective bargaining "representative" of the fireman craft is derived from the Railway Labor Act, which contains, *inter alia*, the following definition: "Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them." 45 U.S.C.A. 151. The Brotherhood was duly elected as bargaining representative in accordance with provisions of the Act. Nowhere does the statute manifest the intention of Congress to establish criteria for membership in the bargaining representative. Nor can it be said that the attention of the Congress was not directed to the fact that some craft members were being denied membership in certain railway labor organizations by virtue of their race. An amendment to the Act (later tabled) proposed to refuse certification to any such organization which denied membership on the basis of race. The able district judge observed: "Apparently the Act itself would not have been acceptable to the Congress if Negro membership in the agent had been required." 156 F.Supp., at page 93. The Supreme Court points out in its opinion in the Steele case, supra, that "the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership * * *." 323 U.S. at page 204. In our judgment, the language of the statute does not support reasonably any other interpretation.

A perusal of the Railway Labor Act makes it abundantly clear that no means of direct control over the actions of the agent selected by a majority of the craft was reserved by the statute to the individual employees. Apparently, the only supervision which any individual may exercise over the duly-elected bargaining representative is the threat of casting his vote in favor of a different representative at a subsequent election. The objective of Congress was industrial tranquility in the arteries of commerce. In choosing the method by which this goal could be achieved, it was deemed necessary to take from individual employees the right to negotiate their own contracts of employment. The question presented on the record before us is whether or not the Congress transcended the constitutionally protected rights of individual employees when it stripped them of their bargaining privileges as individuals and conferred that function upon a majority-elected representative, over which the individual has no direct control and in which he is not eligible for membership. It is not contended that the Negro firemen are deprived of their voting rights in the election of a bargaining representative. Their complaint is that they are a minority group whose rights are abridged, for the reason that, as a result of their ineligibility for membership in the appellee Brotherhood, they have no

control over the internal affairs of the representative elected by the majority.

[*Rights of Individual*]

Although these proceedings have been punctuated by accusations of racial discrimination, it would seem that we are really concerned only with ascertaining the rights of any person who, for any reason, finds himself in a minority or out-voted status, the issue of actual discrimination by the Brotherhood having been subtracted from the issue by the findings of the district judge, as hereinbefore stated. Various facets of the collective bargaining process involving the rights of the minority have already been litigated before the Supreme Court. That tribunal has decided against the validity of agreements respecting changes of pay negotiated by individuals after pay rates had been established by collective agreement. Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342.

Individual contracts of employment have been held to be superseded by collective agreements subsequently entered into by the employer and the craft representative. J. I. Case Co. v. N.L.R.B., 321 U.S. 332. There, the Supreme Court discussed at length the underlying principles of the collective bargaining process, with no indication of Constitutional infirmity:

> "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment. * * * The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result." 321 U.S. 332, 338, 339.

There are other decisions of the Supreme Court approving Acts of Congress which, in a limited way, interfere with the right of an individual to negotiate for employment-contract provisions palatable to his individual taste. On the subject of the power of the Congress to facilitate the flow of interstate commerce by enacting the union shop amendments to the Railway Labor Act, the highest tribunal said:

> "Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained. * * * The task of the judiciary ends once it appears that a legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises. The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary." Railway Employees' Department v. Hanson, 351 U.S. 225, 233, 234.

The wisdom of this policy of judicial self-restraint was recognized here in the opinion of the United States District Court:

> "* * * To compel by judicial mandate membership in voluntary organizations where the Congress has knowingly and expressly permitted the bargaining agent to prescribe its own qualifications for membership would be usurping the legislative function. The Congress has entered the field of, and made provision for, labor relations and furnished means of adjusting labor disputes between employers and employees of interstate railways. For injustices due to discrimination or inadequate representation and participation to employees who are not members of the bargaining agent, the employees must look to the legislative, not the judicial branch of constitutional government."

[*Fifth Amendment Aspect*]

The Fifth Amendment to the Constitution of the United States protects the fundamental rights of individuals from invasion by federal governmental action. Unlike the Fourteenth, that amendment contains no equal protection guarantee. See Steward Machine Co. v. Davis, 301 U.S. 548, 584 (1937); Hirabayashi v. United States, 320 U.S. 81, 100 (1943). Appellants insist that we, by interpretation, should expand

the due process clause of the Fifth Amendment to encompass an equal protection guarantee in the same manner that the Supreme Court recently accomplished that result in the field of public education, in Bolling v. Sharpe, 347 U.S. 497. Assuming (without deciding) that we should place such an interpretation on the Fifth Amendment, appellants, in our judgment, are still not entitled to the relief sought, for the reason that this record does not show an agency of the federal government to have been responsible for appellants' plight.

The accusing finger is pointed at the Congress. Only one analysis could tend to lay the responsibility for appellants' situation on our national legislative branch of government: that is, the violation of the Fifth Amendment by the Congress, in its enactment of the Railway Labor Act without including therein a provision requiring a labor union—when duly elected as collective bargaining representative of a craft—to extend membership privileges to all members of the craft, regardless of race. We cannot accept this fine-spun hypothesis, which charges the Congress with federal action of a type proscribed by the Fifth Amendment.

Recent decisions of the Supreme Court in the field of administration of public schooling are not analogous to the instant case. Brown v. Board of Education and Bolling v. Sharpe, supra, were predicated on the fact that affirmative legislation of the states and the District of Columbia, respectively, denied Negroes access to schools supported by public tax funds. These decisions are not applicable here.

The Brotherhood is a private association, whose membership policies are its own affair, and this is not an appropriate case for interposition of judicial control. A decision to the contrary could be frustrated by the simple expedient of the majority's electing directly those individuals presently designated by the union to negotiate with the employer railroads. There is no requirement that employees be represented by persons of the same race. In National Federation of Railway Workers v. N.M.B., 110 F.2d 529, 538; certiorari denied, 310 U.S. 628; it was said that "under the Act, employees are guaranteed the right to select a common bargaining representative and that representative may be a person of any race or color (or association made up of persons of any race or color). The quality of opportunity thus guaranteed is the complete antithesis of discrimination. To hold that colored employees could be represented only by colored persons for bargaining purposes would be to introduce into the administration of the Act the very discrimination which the Federation seeks to avoid."

For the reasons stated herein and those found in the opinion of the United States District Judge, the judgment is affirmed.

* * *

This case was argued to a panel of the court consisting of Martin, Miller and Stewart, Circuit Judges. Judge Stewart became an Associate Justice of the Supreme Court of the United States before a decision was reached or this opinion was prepared. He, therefore, did not participate in the decision, opinion, or judgment in this case.

GOVERNMENTAL FACILITIES
Public Housing—Kentucky

Leola ELEBY et al. v. CITY OF LOUISVILLE MUNICIPAL HOUSING COMMISSION, et al.

United States District Court, Western District, Kentucky, Civ. No. 3240

SUMMARY: Negroes in Louisville, Kentucky, brought an action in federal district court against the Municipal Housing Commission and city officials to require their assignment to public housing projects without regard to race or color. At pre-trial conferences the court indicated that the admission of the plaintiffs to public housing projects on a racially nondiscriminatory basis was required by *Detroit Housing Commission v. Lewis*, 226 F.2d 180, 1 Race Rel. L. Rep. 159 (6th Cir. 1955). The commission then proposed a plan for inte-

grating the housing projects over a period of time contingent upon the completion of additional construction. The court approved the plan on May 24, 1957, but set a limit of one year on the completion of integration and retained jurisdiction of the case to supervise the progress of the plan. (2 Race Rel. L. Rep. 815). In May, 1958, the commission announced informally that two Negro families had been moved into each of two previously-white housing developments. Subsequently, there occurred a number of legal developments which are set out chronologically below:

Intervenors' Petitions

After the Negro families moved, a number of white citizens, some of whom live in the affected housing, filed petitions as intervenors seeking to set aside the judgment of May 24, 1957. These petitions, with their amendments, are set out below:

Now comes the intervenors, Ethel Hart, Betty Dabson, Margaret Myers, Gladys Clark, Bertha Simpson, Hallie Hooker, Mrs. Tava Nelson, and Eldona Dupin, for themselves and all others similarly situated, and state that they have an interest in this litigation, and have been deprived of their rights by the judgment herein, without their being made a party hereto, or given their day in court.

Intervenors state that they are White people and are Tenants of the Louisville Housing Commission and live in the Clarksdale Housing Project, East Jefferson St., Louisville, Ky.: at the time they rented said Apartments, they were led to, and did in good faith believe, that no attempt would be made to deny them as tennants, their inalienable, God-given, and Constitutional right to choose their own associates for themselves and their children, and live exclusively among their own race.

The judgment in this case would take away from them, without right, reason, excuse or justice, their said rights, and force them to either comingle with a race vastly different from them physically, culturally, morally and habitually, or else move at great expense and trouble.

Intervenors state that the Negro population of Louisville constitutes only about 15% of its inhabitants, and notwithstanding this fact, they already have been given the exclusive use of four, or 50% of the eight housing projects of this city.

The judgment in this case in effect will dispossess all White tennants and give this Negro minority the exclusive use of all of the low rent housing projects in this city in violation of all equity and fairness, and is contrary to the Tenth Amendment to the Constitution of the U.S.

Intervenors further state that the judgment in this case is disruptive and provocative and will tend to incite racial bitterness that might lead to violence and bloodshed, and is a hazard to public safety.

WHEREFORE, the intervenors for themselves and all others similarly situated ask the court to vacate and set aside the judgment herein, and allow these intervenors to present their rights in this matter and that upon final hearing, that the complaint filed herein be dismissed and held for naught and for their cost herein and for all other relief, both equitable and legal, general and special, to which they are entitled.

INTERVENORS AMENDED PETITION

Now comes the intervenors, Charles Lawson, H. W. Allen, Henry N. Satterley, Rose Allen, Mrs. Henry Cairm, Mrs. Josie Bowman, Clarice McCarter, Betty Humes, Mary Coons, Myrtle Kinnarney, Mrs. Ruth Hoagland, Mrs. Howard Cundiff, Mrs. Jewell Meers, Mary Milner, Cleveland Snelling, T. K. Roberts, Mrs. Norma Westmoreland, Joe Ance, for themselves and all others similarly situated, and state that the judgment in this case departed from the laws of this state and nation which had been in effect in this country almost 100 years and had been confirmed by a long line of unbroken decisions by the highest courts in the state and in the nation. The smashing and breaking down of these time honored policies, practices and traditions by the judgment herein cannot but be of grave concern to these intervenors, and since such departures involves and destroys the rights of these intervenors under their rental contracts with the Louisville Municipal Housing Commission the judgment in this case is void.

The intervenors state the record in this proceeding shows that the Louisville Municipal

Housing Commission filed a response, revealing the total lack of any merit in the plaintiffs complaint herein, but it did an about face and abandoned its said response and actually adopted the Communist race-mixing program asked for by the plaintiffs in this case. The abandonment of the response herein by the Louisville Municipal Housing Commission was unknown to these intervenors until very recently and they had no opportunity whatever to defend themselves against the denial of their rights in this litigation, which it brought about.

Intervenors further state that a campaign of intimidation and terroristic methods have been employed by the Louisville Municipal Housing Commission, its offices, agents and employees, since their intervening petition was filed in this case, to prevent them from exercising their constitutional and civil rights and presenting to this court the petition they have filed herein. Such illegal misconduct was for the purpose of keeping intervenors from asking this court for the protection of their rights herein. Such intimidation consisted of threats to expel tenants from the housing project if they signed the petition in this case, and that they would be in contempt of this court if they asked it to consider and adjudicate the questions raised by their intervening petitions.

By arbitrary action the Louisville Municipal Housing Commission has, before this court has decided the precise question of these intervenors rights raised in their petition, already maneuvered some Negro families into white housing projects, and they will continue such arbitrary and illegal practices unless this court issues an order of injunction commanding and compelling it to refrain from such intimidation and arbitrary acts until intervenors rights have been determined by this court.

Wherefore, the intervenors asked this court for an order of injunction against the Louisville Municipal Housing Commission, its officers, agents, and employees, and all others, commanding them and each of them, to proceed no further in this case until the rights of these intervenors have been decided by this court, and they renew the demand of their original petition herein.

(Signed) Mrs. Eldona Dupin
Intervenor for self and group.

PETITION BY TENANTS TO
BE MADE PARTIES TO
THE INTERVENING PETITION

Now comes Charles Lawson, H. W. Allen, Henry N. Satterly, Rose Allen, Mrs. Henry Cairm, Mrs. Josie Bowman, Clarence McCartey, Betty Humes, Mary Coones, Myrtle Kimarney, Mrs. Ruth Hoagland, Mrs. Howard Cundiff, Mrs. Jewell Meers, Mary Milner, Cleveland Snelling, T. K. Roberts, Mrs. Norma Westmoreland, Joe Ance, for themselves and all others similarly situated, and state that they are tenants of the Louisville Housing Commission and live in the Clarksdale Project, East Jefferson Street, or Parkway Place, 12th and Hill Streets, Louisville, Kentucky, and they desire to intervene herein and ask that they be made parties hereto as intervenors and they hereby adopt and incorporate by reference the same as if copied in full herein the allegations contained in the intervening petition filed herein on May 23, 1958, by Mrs. Eldona Dupin, and others.

Wherefore, they ask the court to allow this petition to be filed and that they be made a part of the intervenors herein.

May 29, 1958

(Signed) Mary Coons
An intervenor for self and others.

Response to Intervenors' Petition

On June 28, the housing commission filed its response to the intervenors' petitions, together with a memorandum in support of its position:

The defendant, City of Louisville Municipal Housing Commission for response to the intervening petition herein, as amended, states as follows:

1. This defendant denies that the intervenors were led to believe, at the time they rented their apartments, that no attempt would be made to deny them, as tenants, and constitu-

tional or other rights, or the right to choose their own associates or to live exclusively among their own race.

2. This defendant denies that any campaign of intimidation or terroristic methods have been employed by it, its officers, agents, or employees since the intervening petition was filed, or at any time, to prevent the intervenors from exercising their constitutional or civil rights, or presenting to this Court the petition they have filed herein; or that this defendant was guilty of any illegal misconduct or in any way prevented the intervenors from asking this Court for the protection of their rights. This defendant denies that such alleged intimidation consisted of any threats to expel tenants from the housing project if they signed the petition in this case, or any threats that they would be in contempt of this Court if they asked it to consider and adjudicate any questions raised by their intervening petitions.

WHEREFORE, the defendants pray that the relief sought by the intervening petition herein, as amended, be denied and for all proper relief.

N. H. Dosker
419 West Jefferson Street
Lee T. Wolford
501 South Second Street
Counsel for the Defendants

MEMORANDUM FOR THE DEFENDANTS IN OPPOSITION TO THE APPLICATION OF MRS. ELDONA DUPIN AND OTHERS FOR PERMISSION TO INTERVENE HEREIN.

The defendants have been served with copies of the following documents:

1. "Intervening Petition" of eight persons who claim they are white people and are tenants of one of the Housing Projects operated by the defendants in Louisville. Their petition is stated in general terms, but the substance is that they do not believe in integration, and that the judgment entered herein denies them

> "their inalienable, God given and constitutional right to choose their own associates for themselves and their children and live exclusively among their own race".

While all of these parties claim to be tenants of the Housing Commission, Eldona Dupin gives her address as 1712 Rowan, and she is not a tenant of any of the Housing Projects.

2. "Intervenor's Amended Petition" on behalf of eighteen additional persons, who claim that the judgment herein is of grave concern to them and destroys their rights under their rental contract with the defendant. They state that the Housing Commission, after filing its answer

> "did an about face and abandoned its said response and actually adopted the Communist race-mixing program asked for by the plaintiffs in this case".

The substance of this pleading is that these intervenors do not believe in integration and that it will deprive them of their constitutional and civil rights. This pleading is signed by Mrs. Eldona Dupin on behalf of herself and the group although she is not named in this pleading as one of the intervenors.

3. "Petition by tenants to be made parties". This is a petition on behalf of the same eighteen persons on whose behalf the intervenors amended petition was filed, and is merely an application for the filing of their intervening petition. The certificate of mailing is signed by Mrs. Eldona Dupin as "Intervenor and Agent" for the other parties.

4. "Motion by Intervenors to file their petition and that a date be set for hearing", which is signed by Mrs. Eldona Dupin for herself and all other intervenors.

5. "Brief for intervenors" claiming that the judgment herein deprived them of their rights and is void. This brief is signed by Mrs. Eldona Dupin as "Intervenor and Agent for all other intervenors".

We do not understand that Mrs. Eldona Dupin is a lawyer and authorized to practice law else why would she sign these papers as agent for the others rather than as attorney? An attorney is the agent for litigants.

Under Rule 24 of the Rules of Civil Procedure, a person desiring to intervene must make timely application for permission to intervene except in those cases enumerated in Paragraph (a), which are not applicable here. Under Paragraph (b) of that Rule, upon timely application, one may intervene (1) when a statute of the United States confers a conditional right to intervention; or, (2) when the applicant's claim or defense and the main action have a question of law or fact in common. But the Rule further says

> "In exercising its discretion the court shall consider whether the intervention will un-

duly delay or prejudice the adjudication of the rights of the original parties".

The Court will recall that on the pre-trial hearings of this case more than a year ago, the Court pointed out that under the decisions of the Sixth Circuit it would be necessary to order integration and suggested that the defendants offer a Plan which they would consider appropriate. This was done on May 24, 1957. The Court allowed one year, or until May 24, 1958, to put the Plan into effect in an orderly manner. This has worked with remarkable success to the satisfaction of both the plaintiffs and the defendants. We believe this has been a model to go by in the future. There has been no violence and there has been entire satisfaction by everybody involved and everybody's rights have been respected.

Not only have the intervenors come in for the first time one year after the Plan was approved by the Court, but the general statements contained in their pleadings show clearly that they consider integration to be a Communistic plan and are attempting to raise anew the question whether there should be any integration under any circumstances. Boiled down to its substance, that is all they say.

The Court is well aware that the defendants did not abandon the rights of any tenants or anybody, but acted with discretion in co-operation with the Court and the plaintiffs in bringing about a very remarkable well working Plan as contrasted with the difficulties which have arisen in the integration of housing projects in such cities as New York, Chicago, Cincinnati and elsewhere.

Considering the extreme views of the intervenors in their opposition to the decision of the Supreme Court and of the Sixth Circuit, it is clear that this is precisely a case where "the intervention will unduly delay or prejudice the adjudication of the rights of the original parties" (paraphrasing Rule 24 (b)).

The intervenors are asking the Court to re-open this case solely for the purpose of deciding whether or not integration is proper. That has been decided. We submit that a workable Plan has been adopted and is in operation. If these intervening petitions are filed the entire success of the Plan, which has worked so well, will be jeopardized. Whatever the intervenors or anybody else may think about the propriety of integration, there is no use to re-open this case for the reargument of that question. That is exactly what the intervenors want to do.

We submit that the motion and petition for the filing of these intervening petitions should be overruled.

Leo T. Wolford
N. H. Dosker
Counsel for the Defendants

Motion to Strike Response

Subsequently, one of the intervenors moved to strike the commission's response as contrary to the rules of procedure adopted by the court, and as a "violation of due process of law":

Comes the intervenor Mrs. Cleveland Snelling and moves the court to strike from the record of this case the document filed by the defendants styled response to intervenors amended petition, because:

This case has been heard by this court and was under submission when said document was filed, and the filing of the said document is contrary to the rules of procedure obtaining in this court.

(2) The filing of such document under the facts and circumstances surrounding the matter would be a failure of due process of law, as it joins issue on allegation in the intervenors amended petition after the trial has ended, and intervenors opportunity to introduce proof.

Upon this motion the intervenors asked the judgment of this court.

Mrs. Cleveland Snelling
Intervenor

Court Sets Hearing

On July 8, the court, Brooks, J., set hearing for July 15, 1958, on the motion to intervene.

ORDER

This action is set for a hearing on Tuesday, July 15, 1958, on motion to file intervening petition, Amended Petition and "Petition by Tenants to be Made Parties to the Intervening Petition."

IT IS FURTHER ORDERED that if the motion to intervene is sustained, the parties shall be prepared to introduce such evidence on the merits as may be desired.

Additional Intervening Petition

On July 15, the date set for hearing on the petitions, an additional white citizen asked to be heard as an intervenor:

INTERVENING PETITION BY
DR. EDWARD R. FIELDS

Now comes the intervenor, Dr. Edward R. Fields, and states that he is a resident and a citizen of the United States and of Louisville, Jefferson County, Kentucky, and asks to be made a party to the intervening petition in this case, for the following reasons;

The issues in this case involve public safety and morals and the good and peaceful relations between the White and the Negro races, and is of vital interest and concern to every citizen of this state and this republic.

The judgment in this case, if allowed to stand, will result in bitter race hatreds and perhaps violence, as experience has already shown in Chicago, New York, and elsewhere, or else drive the White tenants from all of the low-rent public housing accommodations and deliver them exclusively to the Negro race.

As is ably set out in the original intervening petition, the judgment in this case deprives them of their rights to select their associates and destroys their constitutional right of pursuit of happiness.

The moving cause behind the filing of the complaint by plaintiffs in this proceeding is for these Negroes to impose themselves upon and into the White society of those unfortunate and poor and helpless white people who do not want to be forced to live with them.

Upon this petition, the intervenor, Dr. Edward R. Fields asks to be heard and asks for the judgment of this court.

Dr. Edward B. Fields

Hearing of July 15, 1958

On July 15, 1958, the court heard the petitions of the intervenors and orally indicated the requested relief would be denied. The transcript of the proceedings at that time is reproduced below:

By the Court: We have the case of Leola Eleby versus City of Louisville Municipal Housing Commission, and this action is set here this morning for a hearing on the motion of certain persons who are residents of housing projects to intervene in this action. There is also an amended petition that's been filed to the, or tendered, to the intervening petition, and in addition a petition by tenants to be made parties to the intervening petition.

This case is set down for a hearing, first, on whether or not this intervening petition, the amended petition and the petition by the tenants to be made parties to it may be properly filed, and in the event that the court rules that it may, we will hear such proof on the

merits of this action as the parties desire to introduce.

Now, it's my understanding that the petitioners, the intervening petitioners, are not represented by counsel, is that correct?

Unidentified woman: That's correct, sir.

By the Court: So that means that each individual petitioner will have to represent himself or herself as the case may be. No person can practice law in this court unless they have been properly admitted to the practice of law and have been introduced to the court under the rules.

But we do not deny any person the right to be heard individually in the matters in which they are interested.

So, this will probably be a rather difficult matter to conduct with this number of petitioners and without anyone to represent you as a group.

I'd first like to have the individual appearances who are signatories to the intervening petition.

Doctor Fields: Your Honor, I have a petition here I'd like to file with the court making myself a party to this suit.

By the Court: Are you a resident of the housing project?

Doctor Fields: No, I'm not.

By the Court: Well, I'm sorry—

Doctor Fields: *(Interrupting)* But I'm a resident of the city and—

By the Court: *(Interrupting)* Well, I don't think that gives you a right in this suit to intervene which is between the tenants and the City of Louisville Municipal Housing Commission.

Doctor Fields: Well, I would like—

By the Court: *(Interrupting)* What is your name, please?

Doctor Fields: Doctor Edward R. Fields. I'm a chiropractor on Bardstown Road—Bardstown Road and Bonneycastle, and I know all of these people here who—

By the Court: *(Interrupting)* But you're not a practicing attorney?

Doctor Fields: No, I'm not an attorney. These people have tried to obtain an attorney. They were unable to raise the necessary funds, and they were also unable to find a suitable attorney. We contacted several different people.

By the Court: Well, I'm sorry that the law will not permit a person who is not an attorney to represent anyone else. And the individual petitioners of course have to show a right to intervene in order for the court to consider whether or not the petition should be filed.

Doctor Fields: Well, may I tender this petition to you, sir?

By the Court: You may tender it.
(Doctor Fields hands document to the Clerk of the Court)

By the Court: We will continue. I will call the names of the intervenors whose names have been signed to this intervening petition and ask you please to stand and state where you live so it can be noted that you are present: Ethel Hart . . .

Mrs. Hart: Here.

By the Court: Where do you live, Mrs. Hart?

Mrs. Hart: 548 East Jefferson.

By the Court: Very well. Betty Dobson . . . *(No Response)* Betty Dobson . . . *(No Response)* Margaret Myers . . . *(No Response)* Gladys Clark . . .

Mrs. Clark: Here.

By the Court: Where do you live, Mrs. Clark?

Mrs. Clark: 544 Bellevue Court *(Phonetic)*.

By the Court: And that's one of the housing projects, isn't it, Mrs. Clark?

Mrs. Clark: That's right.

By the Court: Bertha Simpson . . .

Doctor Fields: She no longer lives in the project, Judge.

By the Court: Hallie Hooker . . .

Mrs. Hooper: That's Hooper. I live at 322 . . . *(Street name not audible)*.

By the Court: Is that you?

Mrs. Hooper: Yes.

By the Court: Mrs. Tava Nelson . . . *(No Response)* And Eldona Dupin.

Mrs. Dupin: I don't live in the housing project. I live at 1712 Rowan.

By the Court: What does counsel for the City of Louisville and the Municipal Housing Commission have to say about the persons here who seek to intervene who are not residents of the housing project, Mr. Wolford?

Mr. Wolford: Well, if your Honor please, that's saying that anybody can come into a lawsuit whether they have any interest or not. I don't see how that anybody can come out here and say they want to get in this lawsuit like that. They're not—they have no interest. They're not tenants. We could have the whole city of Louisville come out here if we have that condition. I just don't see how they can intervene if she doesn't live in there.

By the Court: As I understand, and the record discloses it, Mrs. Dupin has also signed a number of these pleadings as agent. Are you an attorney, Mrs. Dupin?

Mrs. Dupin: No. The reason that I signed that petition, at the time it was signed I had a daughter that was babysitting in the project taking care of three children.

By the Court: I see.

Mrs. Dupin: But in the past few days why I've brought her home.

By the Court: Well, under the conditions, I'm sorry, but you will not be able to intervene or appear as an intervenor.

Now, there is also a petition by tenants to be made parties to the intervening petition, and it's signed by a Mary Coons. Is Mary Coons here?

Unidentified woman: She wasn't able to be here. She's sick.

By the Court: I see. Does she reside in one of the housing projects?

Unidentified woman: Yes, sir. She lives at 303 South Jackson.

By the Court: All right. Well, I'll call the names of the parties who have petitioned to be made parties to the intervening petition, and again I can only hear from those who are present. Charles Lawson . . . *(No Response)* H. W. Allen . . . *(No Response)* Henry N. Satterly . . . *(No Response)* Rose Allen . . . *(No Response)* Mrs. Henry Cairm . . . *(No Response)* Mrs. Josie Bowman . . . *(No Response)* Clarence McCarty . . . *(No Response)* Betty Humes . . . *(No Response)* Mary Coons. She's the one that signed this petition.

Unidentified woman: Yes, sir.

By the Court: Myrtle Kimmarney . . .

Unidentified woman: She's not here. She wasn't able to be here, too.

By the Court: Mrs. Ruth Hoagland . . . *(No Response)* Mrs. Howard Cundiff . . .

Mrs. Cundiff: Here.

By the Court: Where do you reside?

Mrs. Cundiff: 514 East Jefferson Street.

By the Court: Mrs. Jewell Meers . . . *(No Response)* Mary Milner . . . *(No Response)* Cleveland Snelling . . .

Mrs. Snelling: 313 South Jackson.

By the Court: Thank you, Mrs. Snelling. T. K. Roberts . . . *(No Response)* Mrs. Norma Westmoreland . . . *(No Response)* Joe Ance . . . *(No Response).*

Apparently, of—there are here present today Ethel Hart, Margaret Myers, Hallie Hooper of those signing the original intervening petition that was tendered, and in addition there is Mrs. Howard Cundiff and Cleveland Snelling present who have now formally entered their individual appearance to this action.

So there are five parties here that desire to be heard on these motions, and I will be glad to hear from any of the five intervening petitioners.

Unidentified woman: Mrs. Myers is here now.

Mrs. Myers: My name is Margaret Myers.

By the Court: Margaret Myers?

Mrs. Myers: Yes, sir.

By the Court: Is that one of the original—was it Margaret Myers?

Mrs. Myers: Yes, sir.

By the Court: Well, I'd indicated that you were already present. I have Ethel Hart, Margaret Myers, and Margaret Hooker . . .

Mrs. Hooper: That's Hooper.

By the Court: Hooper. The petition said Hooker is the reason I read it that way. And Mrs. Howard Cundiff and Cleveland Snelling. Now, is there anybody else present?

Mrs. Dobson: Betty Dobson.

By the Court: Betty Dobson?

Mrs. Dobson: Yes.

By the Court: Did you sign the original . . . yes, I see. Anybody else? What is your name, please?

Mrs. Clark: Gladys Clark.

By the Court: And Gladys Clark. So there are seven intervening petitioners here that desire to be heard. And I will be glad to hear from any of the seven who are properly before the court . . . *(No Response)*

Mrs. Hart, do you desire to say anything?

Mrs. Hart: *(Shakes head negatively).*

By the Court: Mrs. Dobson?

Mrs. Dobson: *(Shakes head negatively).*

By the Court: Margaret Myers?

Mrs. Myers: *(Shakes head negatively).*

By the Court: Gladys Clark?

Mrs. Clark: *(Shakes head negatively).*

By the Court: Mrs. Howard Cundiff?

Mrs. Cundiff: *(Shakes head negatively).*

By the Court: And Mrs. Cleveland Snelling? Do you desire to say anything in support of your petition, Mrs. Snelling?

Mrs. Snelling: Yes.

By the Court: Will you come forward please and address the court.

Mrs. Snelling: Well, all I want—

By the Court: *(Interrupting)* I'll have to hear you, Mrs. Snelling. Maybe you'd better stand back in the middle there.

Mrs. Snelling: I'd rather that the colored people could stay in their own project and let us stay in our project. I think it would be better for the colored people and the white, too, because we both live different lives, and I don't think it would be satisfactory.

By the Court: Is there anything further?

Mrs. Snelling: That's all I can think of right now.

By the Court: Do any of the other intervenors desire to make a statement to the court? And what is your name?

Mrs. Hart: Ethel Hart. I think the colored people should stay on their own project and not mix with us white people on account of those children around. I don't like for my children to be mixed up with the colored people. I have a little girl nine years old, and I don't think they should be mixed, and that's why . . .

By the Court: And you are opposed to integration?

Mrs. Hart: Yes, that's right. I'm opposed to the colored moving in, because it's so close together. See, our wall—there's just a wall between us, we'd be almost living with them. And that's just the way it is. Now, I don't know how you all feel about that, but that's the way I feel. And I don't know how the colored people feels about it. But I think they should stay in their own project and let ours alone, because they've got a project over there on Hill Street and why not them stay in there, because we ain't going to move over in theirs, I'm quite sure. And I think they should be made to stay over in their own project unless—of course, now, there's nothing I can do about it only just say what I'm saying, because I know I can't keep—

By the Court: *(Interrupting)* Well, you have a right to say whatever you care to.

Mrs. Hart: Yeah. I know I can't keep them from there—from moving in. I don't know; they might make me move for even saying this. That's all I got to say.

By the Court: *(To another petitioner)* And what is your name?

Mrs. Clark: Gladys Clark. If they grow up and associate together, why that means that they will probably marry together and then all be living mixed up and just make a mixed up world. That's all I can say about it.

By the Court: So you are opposed to the whole principle?

Mrs. Clark: I'm opposed to living all together. And we have a double door, where they'd just be right there, too. So, I state what I said.

By the Court: All right. Do any of the other intervenors desire to be heard at this time?

Mr. Grubbs: I'm Millard Grubbs. Judge, I'm appearing here as a publisher of the American Eagle covering this trial, and I don't know whether I understood correctly the Court's ruling on Doctor Fields and his petition. I doubt that the Court read it, but it does set out that this case involves public safety and it's a concern of all citizens, both white and colored, and that's what he said. Now, I'm going to write a story on the trial, and I would like—did the Court overrule . . . for the purposes of appeal, I'm talking about . . . did you deny the Doctor the right to file it?

By the Court: I let it be tendered. I haven't seen it—

Mr. Grubbs: *(Interrupting)* You haven't ruled on it?

By the Court: No. I've permitted it to be tendered. I did rule that Doctor Fields could not participate in this proceeding because he's not an interested party. And of course that would apply also to you, Mr. Grubbs, as a newspaper publisher.

Mr. Grubbs: I'm not seeking—well, that's true. But it doesn't imply that I can't publish an article on it.

By the Court: No; no. I'm talking about appearing here.

Mr. Grubbs: Oh, I don't want anything to do with it now.

By the Court: I might say to the people who are gathered here, and of course by your presence express interest in this case, I might give you a very brief history of what has occurred so you will be fully informed.

A suit asking for a declaration of rights was filed in November, 1956. Twelve or thirteen Negro citizens brought this suit asking the Court to declare what their rights were in respect to occupying the public housing projects in the city of Louisville. Of course their primary complaint was that segregation was being practiced by the city of Louisville Municipal Housing Commission.

Thereafter the City of Louisville Housing Commission answered certain interrogatories that were presented to them by the plaintiffs, and the responses to those interrogatories disclosed, without contradiction, and as I guess most of you people here know, that a form of segregation was practiced and had been ever since the projects were built. Some were allocated to white citizens and others to colored citizens.

But it did disclose that separate lists were maintained for those seeking application to the colored municipal projects and that only the white citizens were admitted to certain projects and only colored citizens were admitted to others.

Several hearings were held before the court. It happened that they were in chambers. There was no evidence introduced other than that contained in the answers to the interrogatories. And the plaintiffs made a motion for a summary judgment based upon the facts that were not disputed.

Thereafter, as I say, after several conferences between counsel and the Court, a plan of integration of these housing projects was agreed upon between the counsel, and it was approved by the Court, the Court considering that the decisions of the Supreme Court of the United States and of the Sixth Circuit Court of Appeals, which is the direct appellate court from our court here, had considered that they had established where there was no doubt but what the law requires this integration of these public housing projects.

Now, the plan as was tendered, and as it was approved by the Court, is as follows, and I'll read it to you so that you may be fully informed as to its contents:

> "The defendant, City of Louisville Municipal Housing Commission (hereinafter called the Commission) hereby proposes the adoption of the following plan for integration of White and Negro families in the nine low rent Public Housing Projects under its jurisdiction.
>
> "Since 1937, when the first Public Housing Projects under the jurisdiction of the Commission were constructed, four of the projects have been occupied by White families and four of the projects have been occupied by Negro families. The project now under construction was contemplated to be made available to Negro families. Such practice grew up without the adoption of any rule or regulation of any kind requiring occupancy in any particular project to be either White or Negro, but in prac-

tice there has been this separation. So far as the Commission is able to determine there has been no dissatisfaction with such practice. There has never been a request by any White applicant to occupy a dwelling unit in a project made available for Negro occupancy, and there has never been a request by any Negro applicant to occupy a dwelling unit in any project made available for White occupancy.

"There has never been any discrimination between White and Negro applicants or White and Negro tenants. The projects were built in pairs and the facilities made available for White and Negro occupancy are exactly the same and have been maintained that way.

"Although the population of the city of Louisville is about 16% Negro, as soon as the project now under construction is completed there will be the same number of units available for Negro occupancy as are available for White occupancy.

"The Commission is made up of three White members and one Negro member.

"Virtually all of the units are now occupied except (*a*) there is a constant turn over; and (*b*) in Parkway Place at 13th and Hill Streets, which has heretofore been made available for White occupancy, the Commission has been authorized to convert and is now in the process of converting sixty (60) two bedroom units into forty (40) four bedroom units in order to provide facilities for larger families, as is being provided for in the project now under construction known as Ky. 1-9 in the Southwick area.

"When this plan becomes effective the Commission proposes to permit all applicants to request occupancy in projects heretofore made available for White or Negro occupancy regardless of race or color, and to give due consideration to such requests, regardless of race or color, and will as far as possible place such applicants in available units for which they are eligible under the eligibility rules of the Commission and of the Public Housing Administration, an agency of the United States.

"In considering such requests, the Commission will not compel a White applicant against his wishes to occupy a unit in a project which is occupied predominantly by Negro tenants nor compel a Negro applicant to occupy a unit in a project which is occupied predominently by White tenants. In assigning applicants to public low rent housing units, the Commission will continue to exercise its administrative and managerial functions under KRS 81.180, and under the United States Housing Act of 1937, as amended, and under the rules and regulations promulgated under said act by the Housing and Home Finance Agency and the Public Housing Administration.

"The Commission reserves the right to assign applicants to units in projects other than those preferred by them without regard, however, to distinctions on account of race or color; and the Commission will endeavor to meet the desires of all applicants as far as it is possible to do so."

Now, that is the plan that was submitted and has been approved by the Court. And that approval is over a year ago that that plan was adopted. It became effective, I think, in May of this year, is that correct?

Mr. Dosker: On the 24th of May.

By the Court: On the 24th of May. Since that time the order approving the plan provided that the parties to this action at any time that they felt that the plan was not being executed in accordance with its terms could come into court and be heard on any complaints that they may have. No such motion or no such request has been made of this court up until this time when the intervenors here seek to be made parties to this action.

Without calling upon counsel for the defendants at this time, an order will be entered permitting the intervenors who are here today and whose names have been called to be made parties to this action. And that of course will permit you to have the full right to take any appeals that you might desire from such action as the Court may take.

Apparently the complaint that has been advanced by the few intervening petitioners is that they do not agree with the policy of integration which, as I view it, means that they do not agree with the laws of the United States as they are now interpreted by the Supreme Court of the United States.

I'll hear from counsel—if the intervening petitioners have anything further to offer in the way

of statements or in the way of sworn testimony, why, I'll be glad to hear from them further at this time. *(No Response from Petitioners)* If not, I'll hear from counsel for the defendants.

Mr. Wolford: If Your Honor please, I think you so completely covered the subject that I don't know that there is much to say, except that we would like to say for the benefit of these people who may not understand that we did raise the question in the beginning about the propriety of integration, as Your Honor will recall. I think we stressed that pretty strongly.

On the other hand, we had to be realistic and have regard for the law of the United States as laid down by not only the Supreme Court but by the Sixth Circuit Court of Appeals. And we thought it would be very unrealistic and very unfair to the Court not to come in and present a plan. And we presented a plan which we believe is a good plan. And as proof of that, it has worked perfectly. We've been complimented by the authorities in Washington on the way this plan has worked. They think it has worked as a model.

We have not had the trouble that they've had in other cities. And I would like to say that in this connection I give a great deal of credit to Mr. Dearing who is counsel for the plaintiffs. We have worked well together, and we have gotten along fine. And I think we will continue to do so. I don't think there's any difficulty about that.

I think these people who are coming here are perhaps somewhat misled. And one reason we wanted the Court to retain this case on the docket was so we'd have the benefit of the Court's rulings on anything that might come up. We realized that there may be agitators that might approach these people and they might not understand. We'd like for them to understand. After all, the housing projects here are run for the benefit of the tenants, and we want them to be satisfied.

I know there has been a great deal of agitation among them. We have copies of a good many things that have come in. Mr. Grubbs sent a notice to them to be sure and be here today for the hearing, "Stand Together and Back Your Neighbors; It's a Chance to Keep White Projects White." And if that were an issue in this case, why, I think we could relitigate that. I can't imagine that there's any reason to go into the question of relitigating the question of whether there should be integration.

Mr. Grubbs has also—

Mr. Grubbs: *(Interrupting)* Just a minute now. If Mr. Grubbs is going to be enjoined in this case, he'd like for it to be of record so I can plead to it and defend myself. I understood this was merely a case between these litigants and them. Now that counsel has—these tenants are organized and they've done that faithfully and honorably, and now, if this Court doesn't want us in this case, then we want our name left out of it.

By the Court: Very well, Mr. Grubbs. *(To Mr. Wolford)* You may proceed.

Mr. Wolford: I'm not treating Mr. Grubbs as a litigant in this case. I'm saying, I want these tenants to understand, we realize that Mr. Grubbs has through his organization created certain agitation here, and I think that's the result of this. Now, I'm not meaning to be antagonistic to any of the tenants—

Mr. Grubbs: *(Interrupting)* You're willing for the NAACP to be in it.

Unidentified Man: That's right.

Mr. Wolford: Mr. Grubbs has been pretty strong in some of the statements that have been sent to us, mailed to us, but—by the American Eagle and—

By the Court: *(Interrupting)* I don't believe, Mr. Wolford, that the Court is interested in that.

Mr. Wolford: All right. I won't go into that.

But I say I think we can get along very fine with the tenants in the absence of any interference. We can get along fine with the plaintiffs in this case. We're going to work this thing out fine if we can do it without interference by people who are not tenants. We can get along with the tenants all right, I'm sure of that.

And if Your Honor feels they should intervene, of course that's Your Honor's decision and it's within your discretion. There's nothing for us to say about that.

But I would like for us to continue to work along and work this thing out successfully as we have been able to do for a year. I think we can. I know we have the cooperation of Mr. Dearing and all of the people who have heretofore been parties to this case.

Now, there's been nothing said here to go into the merits of this question on the intervening petition. There's been nothing said in their pleadings or in their statements here this morning except that they do not believe in integration.

Now, if Your Honor wants to reopen that case, of course that's again in your discretion. But in view of the decisions of the, certainly of the Circuit Court of Appeals of this Circuit, I don't see much grounds for reopening it. That's really a decision for Your Honor to make.

And I can't think of anything further we can say, except that we do want to report to the Court that we have been doing, we think, a very good job on working this out peaceably and gradually. And we're very careful about the people that have been put into these projects.

As Mr. Dosker points out that the five who intervened are only five out of some five thousand tenants who we have in these projects.

By the Court: I think there are seven intervenors, Mr. Wolford.

Mr. Wolford: Seven, that's right.

By the Court: Mr. Dearing, do you have anything you care to say?

Mr. Dearing: If the Court please, of course Mr. Wolford and Mr. Dosker and I on this matter are in harmony and are of one accord. So what Mr. Wolford says of course goes for the plaintiffs as well.

But I would like to point out to the Court that this action was filed, as the Court knows, under the Judicial Code of the United States and under the applicable rules which specify the jurisdiction of the Court and of the subject matter and of the persons and designated the parties who were to be made parties defendant and parties plaintiff, and I don't feel that the intervenors have shown themselves eligible under those statutes, under those rules, to be made parties of this kind of action.

By the Court: Well, I've already ordered that they be made parties and they are made parties to this action.

Mr. Dearing: Yes, sir.

By the Court: I think that everybody has a right to be heard.

Mr. Dearing: That's all I have.

By the Court: And certainly being tenants of a project you have a right to be heard, and that's what this court is here for, to hear you.

I think I stated earlier that the law, it seems to me so well established that we must have integration in these public housing projects, that those that disagree with that policy, as of course intervenors do, a lot of people do, in a proceeding of this kind we just have to deny that is an issue in this case.

There has never been appealable order—there might—the order approving the plan might be considered an appealable order, but I will suggest to counsel for the plaintiffs and for the defendants to consider that problem. If these petitioners desire to take an appeal of this case, I want them to be in a position to exercise that privilege.

So if you will, consider it, and advise the Court as to whether or not perhaps findings of fact and conclusions should be entered in this case and a more formal final order entered approving the plan and I will entertain such a motion.

Mr. Wolford: If Your Honor please, we feel there is some merit in Your Honor's retaining jurisdiction here. We haven't run into trouble, but we might. And when I say trouble, I mean on either side. It may be Mr. Dearing will feel that we're not carrying out—

By the Court: *(Interrupting)* I have no intention of removing this case from the docket.

Mr. Wolford: We'd like to have you retain jurisdiction for the benefit of everybody.

By the Court: And I will. I just want to be sure that if any of the intervenors desire to take an appeal on the Court's ruling of law here as to whether or not this order is legally proper I want them to be in position to do that.

Mr. Wolford: Would it not be proper for them to submit findings?

By the Court: I'm not asking for findings as a result of this proceeding here. I will enter those myself. And I think I have stated them orally from the bench.

Mr. Wolford: Yes, sir.

By the Court: But I was referring to findings, Mr. Wolford, supporting—maybe the plan contains a finding sufficiently, but whether the order approving the plan is a final, appealable order is what I'd like for you to consider.

Mr. Wolford: All right.

By the Court: Now, do any of the intervenors desire to say anything further?

Mrs. Snelling: Is there time to brief the case?

By the Court: How much time would you like to have?

Mrs. Snelling: A week?

By the Court: Certainly. And does any other of the parties to this action desire to bring anything further to the attention of the Court at this time?

Doctor Fields: I would like to make notice of an appeal of the petition I tendered.

By the Court: Of course you cannot file a notice of appeal, Doctor Fields. I've tried to make it clear that one of the intervenors must do that, or you must have counsel. And I'm absolutely prevented from permitting anybody to litigate or represent anyone in this court, as are all judges in all courts, unless they are attorneys and have been admitted to practice before the court. You can understand the reason for that, I hope.

Doctor Fields: Yes, sir.

By the Court: It would be pretty difficult for a court to properly conduct its proceedings if laymen who are unfamiliar with the rules of the court were permitted to come in as agents for parties that might have interest in a proceeding.

If there's nothing further to come before the Court, Mr. Marshal, adjourn Court.

(Whereupon, at about the hour of 10:50 A.M. the proceedings were terminated and court was adjourned.)

Order of July 16, 1958

After the hearing, the court entered an order allowing the intervening petitioners a week in which to file a brief in support of their petition:

This cause was heard on pending motions and on the merits on July 15, 1958, in accordance with order dated July 8, 1958. There appeared Mr. J. Earl Dearing, counsel for the plaintiffs, Mr. Leo T. Wolford and Mr. Nicolas H. Dosker, counsel for the defendants. Intervenors, Mrs. Gladys Clark, Mrs. Ethel Hart, Mrs. Hallie Hooker, Mrs. Betty Dobson, Mrs. Nellie Cundiff, Mrs. Cleveland Snelling, and Mrs. Margaret Myers, all of whom are white tenants in housing projects under the control of the defendant Louisville Municipal Housing Commission, appeared in person. In addition to the intervening petitioners present in court, it appeared from tendered pleadings that Mrs. Bertha Simpson, Mrs. Tava Nelson and Mrs. Mary Coons by their personal signatures to the pleadings represented themselves to be white tenants of said housing projects and desired to be made parties to this action.

Dr. Edward R. Fields tendered an intervening petition requesting that he be made a party to this action.

The named intervenors and counsel for the plaintiffs and defendants were given an opportunity to be heard on the pending motions and on the merits of the case. Oral statements were made by intervenors. Counsel for plaintiffs and defendants were heard.

The parties not desiring to present further argument or to introduce evidence, the Court orally indicated that the relief prayed for by intervenors would be denied on the authority of the decisions of the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit. (See Brown v. Board of Education, 347 U.S. 483, Buchanan v. Warley, 245 U.S. 60, Detroit Housing Commission v. Lewis, 226 F.2d 180). Whereupon the intervenors requested one week in which to file brief. The Court being advised,

IT IS ORDERED:

1. That the intervening petition be and it is filed and the motion to intervene is sustained as to the persons signing said petition with the exception of Mrs. Eldona Dupin, who is not a tenant in a public housing project under the supervision of the defendants.

2. That the petition by the tenants to be made parties to the intervening petition be and it is filed and the motion to intervene is sustained

as to the intervenors who were present in court and as to Mrs. Mary Coons, who signed said pleading.

3. That intervenors' amended petition be and it is filed.

4. That this cause stand submitted and intervenors are allowed one week in which to file brief addressed to pending issues.

HENRY L. BROOKS
United States District Judge

Brief for Intervenors

Subsequently, the intervenors filed their brief attacking the validity of the judgment on a number of grounds:

BRIEF FOR INTERVENORS
ON THEIR PETITION TO SET
ASIDE THE JUDGMENT HEREIN

This cause is before the court on petition of the intervenors to set aside the judgment herein, under the court's order entered July 16, 1958.

The intervenors cause of action in this proceeding in large part is set out in their petition with these words:

> "Intervenors state that they are White people and are tenants of the City of Louisville Municipal Housing Commission: that at the time they rented their apartments, they were led to and did in good faith believe that no attempt would be made to deny them as such tenants, their inalienable, God-given and constitutional rights to choose associates for themselves and their children.
>
> The judgment in this case would take away from them without right, reason, excuse or justice their said rights, and would force them to either commingle with a race that is vastly different from them physically, morally, culturally, and habitually, or else move at great expense and trouble.
>
> Intervenors further state that the Negro population of Louisville constitutes only about 15% of the inhabitants of the city, and that notwithstanding this fact they already have been given one half of all the low-rent public housing accommodations in Louisville for their exclusive occupancy and use.
>
> The judgment in this case, in effect, will dispossess all White tenants and give the Negro minority race the exclusive use of all public housing projects in this city, in violation of all equity and fairness."

The hard truths above quoted stand before the court in this hearing undenied and as a matter of law admittedly true and must be considered as such by the trial judge, and under these circumstances almost every principle of law and rule of equity call for a removal of the judgment in this case.

Before advancing to argument upon the laws that control this proceeding, it's impossible for me not to pause and reflect a moment upon the pathetic scene in this court room, when these unlettered and unlearned intervenors, without any attorney to help them and with no knowledge whatever of the rules of evidence and procedural steps, moved forward at the call made by the court to come to the Bench and start the evidence—come forward under such handicaps to face a hostile judgment and a battery of three shrewd and clever attorneys at law to oppose them. It was not a cheerful scene in the administration of justice—especially in a court of equity. Yet the intervenors stood before the judge of the court and amid such scenes asked him in substance not to allow a judgment to stand that would drive them from their homes and turn their living quarters over to a group busily engaged in promoting racial strife and hatreds pursuant to the Communist race-mongrelization program.

[*Misleading Charged*]

Taking advantage of the situation caused by the inability of these poor and helpless intervenors to obtain any legal representation, one of the opposing attorneys, Leo Wolford, sought to mislead the court by making gross misstatements that "integration was working fine", when in truth and in fact, it's not working at all and won't work. The couple of Negro families who already have been moved into White housing

projects, know they are not wanted and because of that knowledge they stay in doors with shades tightly drawn down most of the time, while ominous rumbling of dislike and trouble fill the air. This method of falsehood concerning the strong and overwhelming opposition of White people to forced race-mixing is the same that the red press has used to deceive the American people regarding the conditions in the public schools of Louisville and Jefferson County, Kentucky.

The opinion by the U.S. Supreme Court of May 17, 1954, in Brown v. Topeka Board of Education 347 U.S. 483 cannot lawfully and constitutionally be made the basis of any other judgment, as it is admittedly not based upon the Constitution and laws of the United States—but is based on writings by Communist collaboraters whom the court seems pleased to refer to as "Modern psychological authorities." That opinion is destitute of every essential legal element necessary to give validity to a court opinion. It amounts to open rebellion against the Constitution and laws of the United States as below set out:

> TENTH AMENDMENT TO THE U. S. CONSTITUTION:
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

In construing the Tenth Amendment above quoted, the Supreme Court of the United States in the case of Gordon v. U. S. 117 U.S. 697: said:

> "The reservation to the states respectively can only mean reservation of the rights of sovereignty possessed by them before the adoption of the Constitution of the United States, and which they had not parted with by that instrument. Any legislation by Congress beyond the limits of the powers delegated, would be trespassing upon the rights of the states, and would not be the supreme law of the land, but would be null and void."

Two constitutional questions are settled by the above quoted case: (1) Congress, when it acts within the limits of its constitutional powers, is the supreme and only law-making body under the Constitution—not the opinions of courts; (2) the unauthorized act by Congress, or any other branch of the Federal Government that trespasses upon the rights of the states is null and void. The Supreme Court opinion in the case of Brown v. Topeka Board of Education is a glaring trespass upon Congress and the sovereign states and is null and void.

> CASE OF PLESSY V. FERGUSON 163 U.S. 537
> The argument social equality may be achieved by legislation, and that the equal rights of the Negro cannot be secured except by enforced commingling of the two races, WE CANNOT ACCEPT.
>
> If the two races are to meet on terms of social equality, it must be the result of natural affinity, a mutual appreciation of each others merits and the voluntary consent of the individual.
>
> Legislation is powerless to eradicate social instincts or abolish distinctions based on physical differences, and any attempt to do so can only result in accentuating the difficulties.* * * If one race is inferior to another socially, the Constitution of the U. S. cannot put them on the same plane."

The Earl Warren—Felix Frankfurter Communist influenced opinion in the school cases, in the teeth of all human experience and in defiance of all law would persevere in madness and folly to try to foist upon our country the desolating consequences of civil war. It tries to force White people to commingle with Negroes against their wishes and will—it tries to put the two races upon the same social plane. The Authors of this outrage have lit a fuse that may bring an explosion they little expected. The desks of the Clerks of the House of Representatives and the Senate are now piled high with resolutions and demands for their impeachment and arrest.

In Cummings V. Richmond County Board of Education, 175 U.S. 528, The Supreme Court of the United States, obedient to its oath and the Constitution and laws of this nation, wrote:

> "The education of children in schools maintained by state taxation is a matter that belongs to the respective states."

As late as 1927, the Supreme Court of the U.S., in the case of Gong Lum v. Rice 275 U.S. 78, in speaking for the court, Chief Justice Howard Taft, a former President of the United

States indignantly spurned doing what the Warren opinion is seeking to do. Upholding the Constitution, Chief Justice Taft wrote:

"The decision is within the discretion of the states in regulating their public schools, and does not conflict with the 14th Amendment.

The power and right of the states to regulate the method of providing education for its youth at public expense is clear."

It would be useless and disgusting to cite all the authorities that show the Supreme Court had no such authority as it undertook to exercise in the case of Brown v. Topeka Education. In summing up the laws that forbid and make void the said Supreme Court opinion, and all other opinions based on it, W. E. Michael, a nationally known lawyer and an authority on the Constitution of the United States, had the following to say about the lawless opinion by the U.S. Supreme Court:

"The Tenth Amendment to the Constitution of the United States stands squarely across the path of integration. The Constitution no where gives the Federal Goverment the right to control public schools and no amount of subtle sophistry can change or alter that fact."

"If the Tenth Amendment means what it says, and what the Supreme Court of the United States and all other courts have said it meant for more than a century, the Warren group opinion in the school cases is flatly in the face of and in violation of the Tenth Amendment."

We regret that the Supreme Court's opinion in the school cases is not a pleasant subject for discussion. But the importance of trying to protect ourselves and our children from its disastrious effects compels us to do so. In a speech on the floor of the Senate, U.S. Senator denounced the opinion in these sentences:

"The Supreme Court of the United States has perpetrated a monstrous crime in the false name of law. The court not only arrogated to itself powers not delegated to the United States under the Constitution —not only invaded the legislative branch of government, but is attempting to graft into the organic law of this land, the teachings, preachments, and political philosophy which is the antithesis of the principles upon which the nation was founded. The origin of this philosophy can be traced to Karl Marx, and the propagation of it by the Supreme Court is a part and parcel of the Communist conspiracy to divide and destroy this republic by internal controversy."

The records of the House Committee on Un-American Activities leaves no room to doubt or dispute the charge made in the above quotation. Indeed, the opinion itself brazenly lists the Communist writing as its basis.

The people of this republic are demanding that the judicial tyranny embodied in this said opinion be immediately stopped. In obedience to that public demand, the U.S. House of Representatives just a couple of days ago passed a bill to curb the Supreme Court in its wild career of tearing up this republic. Other agencies are now being organized to bring to the Bar of criminal justice all of those who betray public oath and trust in advancing the Communist movement. Keeping step with the growing popular public demand that judges stop submitting to the unauthorized and unconstitutional opinions of the U.S. Supreme Court, U.S. District Judge Harry J. Lemley, Little Rock, just recently upset and overruled the original judgment in the Little Rock Central High School integration matter. Close upon the heels of Judge Lemley's judgment, the U.S. Circuit Court of Appeals for the Fifth Circuit, on July 2, 1958, denied a Negro woman the right to an apartment in an all White housing project in Savannah, Georgia.

Under the mandate of the foregoing authorities, the judgment in this case is without warrant of law or legal sanction and should be set aside.

Mrs. Cleveland Snelling,
and all other intervenors

Judgment of August 8, 1958

On August 8, the court rejected the intervenors' petitions to set aside the judgment, and reaffirmed its order approving a plan of integration.

This cause is submitted on the intervening petitions and motions of the intervenors herein. On July 16, 1958, all intervenors were given an opportunity to be heard on their pending motions and on the merits of the case and briefs have been filed and considered.

It appearing that the basic complaint of the intervenors is their personal dissatisfaction with the integration of the housing projects under the control of the Louisville Municipal Housing Commission, and the Court being advised and relying on the authorities cited in the order dated July 16, 1958,

IT IS NOW ORDERED AND ADJUDGED as follows:

1. That the motion of Edward R. Fields to intervene be and it is denied.

2. That the motion of the intervenors to vacate and set aside the order entered herein on May 24, 1957, approving the proposed plan for integration be and it is denied.

3. That the Court upon further consideration of such plan of integration hereby reaffirms its order approving such plan.

4. That the motion of the intervenors for an order dismissing the complaint herein be and it is denied.

5. That the intervening petition as amended be and it is dismissed.

August 6, 1958

Henry L. Brooks
United States District Judge

GOVERNMENTAL FACILITIES
Urban Renewal—Alabama

Stephen TATE, et al. v. The CITY OF EUFAULA, Alabama, et al.

United States District Court, Middle District of Alabama, Northern Division, August 5, 1958, 165 F. Supp. 303.

SUMMARY: In a class action against the City of Eufaula, Alabama, and its Housing Authority, Negro citizens sought in federal district court an injunction and declaration of rights in connection with slum clearance and urban redevelopment plans. The plans called for most of the land involved to be sold or leased to private parties for residential developments, but portions would be made available to the city for a park and for constructing school facilities. Plaintiffs, residents of the area, alleged a "tacit understanding" between defendants and unidentified private enterprise interests that new homes in the area would be sold or leased only to white people, and further alleged that defendants would segregate the races in the proposed housing, school, and park area. The court dismissed the complaint for failure to state a cause of action and to allege a presently existing and genuine justiciable controversy as required by the Declaratory Judgment Act. The court said that there was no showing that contract negotiations had been commenced between defendants and anyone else regarding any of the proposed uses of the area and that there was no evidence to support the alleged "tacit understanding" to discriminate along racial lines. The court noted that certain covenants against racial discrimination are specified in the plans. As the matters complained of were based solely on speculation that defendants in the future might not follow their obligations under the law, the court refused the relief requested.

JOHNSON, District Judge

This cause is now submitted upon the motion of the defendants seeking to have the Court dismiss the action.

The action was instituted by the above-named adult Negro citizens, all of Eufaula, Barbour County, Alabama, as plaintiffs on behalf of themselves and others similarly situated. Institution of such a class action is authorized by Rule 23(a) (3) of the Federal Rules of Civil Procedure, 28 U.S.C.A. The plaintiffs own property in an area located within the City of Eufaula, Alabama, which area is to be redeveloped with federal financial assistance as authorized by the Urban Renewal Administration of the United States Government (Housing Act of 1949, as amended; Title 42 U.S.C.A. §§ 1450–1483). The plan in general calls for the purchase or the condemnation of all residences in the area designated for redevelopment.

Each of the plaintiffs resides in a house within the development area which has been designated for redevelopment. Each plaintiff will be required to vacate his or her home after it has been purchased or legally condemned.

The defendant City of Eufaula, Alabama, is a municipal corporation, organized and existing under the laws of the State of Alabama. The defendant Housing Authority is a public corporation, organized and existing under the laws of the State of Alabama. The defendant Wrighton is the Executive Director of said Housing Authority. These defendants are authorized by the laws of the State of Alabama to adopt and effectuate plans for such redevelopment program.

Specifically, the redevelopment plan calls for, after purchase or condemnation of the property within the prescribed area, demolition of the structures upon the theory the area is a blighted one, for construction of new streets, and the installation of other improvements, such as sewage facilities—all toward preparation of the area for redevelopment. It is contemplated that most of the land will ultimately be sold or leased to private parties for residential development in accordance with said plan. Said plan also authorizes the eventual sale of certain of the lands to the City of Eufaula to be redeveloped by said city as a park and recreational area. The plan also authorizes the eventual acquisition of some of said area for the purpose of constructing school facilities by the Board of Education. In the event the Board of Education does not acquire from the Housing Authority any of the area for school purposes, the plan authorizes the sale or lease of that part of the area to private individuals for residential purposes.

[*"Tacit Understanding" Alleged*]

Plaintiffs allege a "tacit understanding" between all defendants and the private enterprise interest (not designated or identified) that such homes are to be sold or leased only to white persons. Plaintiffs also allege that it is defendants' "policy, custom and usage" to segregate Negro and white persons in public programs and activities, and that it is their "plan" to do so after construction of the housing project, the school, the park, and the development of the residential area.

No contracts have been entered into (nor have negotiations commenced) between any of these defendants, or any defendant and anyone else, concerning the proposed school, park, or private dwellings. However, the plan requires that any such contract contain a provision "to the effect that no agreement, lease, conveyance or other instrument shall be effected or executed * * * with respect to any land in the project area owned by them which will restrict, upon the basis of race, religion, color or national origin, the sale, lease or occupancy of the property."

Plaintiffs further aver they and members of their class "have appealed to defendants to protect their right to purchase or lease homes and use other facilities in the * * * area *after its redevelopment*, but defendants have failed and refused to do so." (Emphasis added.)

The project has proceeded only to the point that a contract has been entered into between the defendants and the Urban Renewal Administration, the city has approved the plan and agreed to furnish certain financial assistance, and the negotiation and condemnation proceedings in the state courts have been commenced.

Upon this set of facts the plaintiffs—alleging threat of immediate and irreparable injury to their federal statutory and constitutional rights—pray that this Court will:

(1) Decree and adjudge the legal relations and rights of the parties.

(2) Permanently enjoin these defendants from:

(a) continuing their policy of racial segregation in public housing.

(b) failing to provide other housing as required by Title 42 U.S.C.A. § 1455 (c),
(c) failing to incorporate in their contracts with the private redevelopers a requirement to lease or sell without discrimination because of color, and requiring the park, school, and other facilities be made available to all eligible without color discrimination, and
(d) refusing plaintiffs and the members of their class the right to use all the facilities in the project area.

The defendants assign twenty-six grounds as reasons why the complaint should be dismissed. The grounds assigned by defendants may be classed in four general groups:

(1) Lack of jurisdiction in this Court.
(2) No present justiciable controversy exists; i. e., prematurity of claim.
(3) Failure to state a claim.
(4) Absence of certain indispensable parties.

It is well settled that a court, in considering such a motion to dismiss, must take and consider all the facts stated in the complaint as being true. Porter v. Karavas, 10 Cir., 157 F.2d 984; Landreth v. Wabash Railroad Company, 7 Cir., 153 F.2d 98, certiorari denied 328 U.S. 855, 66 S.Ct. 1345, 90 L.Ed. 1627.

It is equally well settled, as stated by the Fifth Circuit, speaking through its chief judge, in McGuire v. Todd, 1952, 198 F.2d 60, 63, that:

> "[W]e disregard, as mere conclusions, the loose and general, the factually unsupported, characterizations of the complained of acts of the defendants, as malicious, conspiratorial, and done for the purpose of depriving plaintiffs of their constitutional rights; that the things defendants are alleged to have done, as distinguished from the conclusions of the pleaders with respect to them, do not constitute a deprivation of the civil rights of plaintiffs, do not give rise to the cause of action claimed; * * *".
>
> Another way of putting it is that mere characterization in a complaint of conduct as unlawful does not meet the test of sufficiency. Dinwiddie v. Brown, 5 Cir., 230 F.2d 465.
>
> The plaintiffs' complaint, viewed and analyzed with these well-founded principles in mind, fails to meet the test. Such a study reveals the complaint to be insufficient insofar as stating a cause of action and alleging a presently existing and genuine justiciable controversy.

[*"Tacit Understanding" Not Proved*]

There are no facts or circumstances averred, or even inferred, to justify plaintiffs' conclusion as to a "tacit understanding" between these defendants and others to discriminate against them because of their color. There are no facts or circumstances averred to justify plaintiffs' conclusion as to a "scheme or design" on the part of the defendants to use the urban redevelopment program to discriminate against these plaintiffs, and others similarly situated, because of their color.

The allegations regarding the "policy, custom and usage" by defendants concerning the Western Heights Project and the Chattahoochee Court Project are mere surplusage, since there is no allegation anywhere in the complaint that any of the plaintiffs or any other eligible Negroes have been refused admission to the Western Heights Project because of their color. Indeed, it does not even appear that they are eligible, and if we were to assume that they were, nothing concerning such an application is averred. Such an application would be necessary. See the recent case of Cohen v. Public Housing Administration, 5 Cir., 257 F.2d 73.

In this complaint, before there is a genuine and presently existing justiciable controversy as required by the Declaratory Judgment Act, 28 U.S.C.A. §§ 2201, 2202, this Court must assume the redevelopment plan will be fully executed, the school board will acquire the land from the Housing Authority and construct thereon a public school, that qualified eligible Negroes will seek admission and that the school board will deny such applications solely on account of the fact they are Negroes; that land for a public park will be acquired and a public park developed thereon, that Negroes will desire to use such park facilities and will be denied that use solely because they are Negroes; that these plaintiffs and/or others similarly situated will in good faith apply for public housing and if eligible will be discriminated against solely because of their color; and that the redevelopers will violate the binding covenants. This Court

declines to declare or enjoin upon such future contingencies. Needless to say further, the complaint does not aver facts to sustain the bare conclusion that plaintiffs are threatened with irreparable damage and injury.

As has often been stated, it must be presumed that public officials, such as these defendants, will observe in good faith the Constitution and laws. See Davis v. Arn, 5 Cir., 199 F.2d 424; also Shuttlesworth v. Birmingham Board of Education of Jefferson County, Alabama, D.C.N.D. Ala., 162 F.Supp. 372.

[*Assumption That Law will be Obeyed*]

Thus, this Court must now assume that these defendants, their agents and successors in office, after receiving the federal assistance in this public project, will, upon a completion of this project (or any phase of it), recognize the law that is now so clear; this law being to the effect that there can be no governmentally enforced segregation solely because of race or color. For the application of this rule to public housing see: Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149; Detroit Housing Comm. v. Lewis, 6 Cir., 226 F.2d 180; Heyward v. Public Housing Administration, D.C., 135 F.Supp. 217, reversed in part by the Fifth Circuit and reported in 238 F.2d 689. For the application of this principle to schools see: Brown v. Board of Education, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and Brown v. Board of Education, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083; also Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230; Gibson v. Board of Public Instruction of Dade County, 5 Cir., 1957, 246 F.2d 913; Borders v. Rippy, 5 Cir., 1957, 247 F.2d 268, and Rippy v. Borders, 5 Cir., 1957, 250 F.2d 690. For the application of this principle to public recreational facilities see: City of St. Petersburg v. Alsup, 5 Cir., 1956, 238 F.2d 830; Muir v. Louisville Park Theatrical Association, 347 U.S. 971, 74 S. Ct. 783, 98 L.Ed. 1112; Ward v. City of Miami, D.C.Fla., 151 F.Supp. 593, affirmed 5 Cir., 1958, 252 F.2d 787.

If these defendants, their agents or successors, as public officers and with federal financial assistance complete this project or any phase of it, they do so with the certain knowledge that there must be a full and good faith compliance with this existing law.

Because the question now presented must be decided in accordance with the above, this Court sees no necessity for discussing the point raised by defendants' motion as to whether there has been a failure by plaintiffs to join indispensable parties.

In accordance with the foregoing, a formal order will be entered granting defendants' motion to dismiss.

INDIANS
Treaty Rights—Federal Statutes

The PRAIRIE BAND OF POTAWATOMI INDIANS, et al. v. UNITED STATES.
THE CITIZEN BAND OF POTAWATOMI INDIANS, et al. v. UNITED STATES, Hannahville Indian Community et al.

United States Court of Claims, July 16, 1958, 165 F.Supp. 139.

SUMMARY: Two bands of Indians of the Potawatomi Nation petitioned the Indian Claims Commission to recover the difference between the sum of money paid their nation in 1846 for certain Iowa and Kansas lands and the then value of such lands. The lands had been acquired under 1833 and 1837 treaties in which the nation had conveyed its lands east of the Mississippi river to the United States and agreed to move to the Trans-Mississippi lands. An interlocutory order was entered allowing petitioners in the consolidated cases over three million dollars on the ground that the amount paid in 1846 was grossly unconscionable. The Commission, however, dismissed a petition to intervene by a third group of Indians, a "community" now living in Wisconsin, descendants of Potawatomi who did not move to the Trans-Mississippi lands but continued to occupy lands ceded to the United States under the 1833

and 1837 treaties. The "community" appealed to the federal Court of Claims, contending that certain appropriations in their behalf over the years since the treaties were evidence that Congress recognized the right of all Potawatomi, whether or not they emigrated west, to share in the proceeds of the Iowa and Kansas lands. The court, however, upheld the Commission's determination that such congressional action was merely to alleviate the economic need of the stray bands in Wisconsin and was never intended as recognition of alleged rights in the western lands. Appellants also contended that membership of their community in Potawatomi tribes prior to the 1833 and 1837 treaties continued thereafter so as to entitle them to share in tribal benefits of the 1846 treaty. The court agreed that continued membership in the tribe would so have entitled appellants, but held that they had lost membership through absence from the main body of the tribe and tribal territory and existing apart from tribal authority. Judgment dismissing the petition for intervention was affirmed.

Before REED, JUSTICE (Retired), and JONES, MADDEN, and LITTLETON, Judges.

MUNICIPALITIES
Boundaries—Alabama

C. G. GOMILLION, et al., on behalf of themselves and others similarly situated v. Phil M. LIGHTFOOT, as Mayor of the City of Tuskegee, et al.

United States District Court, Middle District, Alabama, Eastern Division, October 31, 1958, Civil Action No. 462-E.

SUMMARY: Twelve Negroes brought a class action in federal district court against officials of the City of Tuskegee and of Macon County, Alabama, seeking a declaratory judgment and injunctive relief against the 1957 Alabama Act redrawing the boundary of Tuskegee. [2 Race Rel. L. Rep. 856 (1957)]. The effect was to remove from the municipality all but four or five qualified Negro voters and no qualified white voter. The court held that, regardless of the motivation behind the act and of the effect of the act on plaintiffs' right to vote in city elections, it had no authority to invalidate the act. The court said that absolute control over municipal boundaries is vested in state legislatures. Accordingly, defendants' motion to dismiss the complaint for failure to state a claim upon which relief could be granted and for lack of jurisdiction was granted. The opinion and judgment appear below.

JOHNSON, District Judge:

MEMORANDUM OPINION

This is an action brought by the plaintiffs, and the class they represent, against the defendants, who are officials of the municipality of Tuskegee, Alabama, members of the Board of Revenue of Macon County, Alabama, and officials of Macon County, Alabama, in which county the municipality of Tuskegee is located. The action seeks a declaratory judgment, rendering invalid Act No. 140 enacted by the Legislature of the State of Alabama during its 1957 Regular Session. Plaintiffs allege that said Act is invalid in that it is, as to them and the class they represent, in violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and also in violation of the Fifteenth Amendment of the Constitution of the United States. Plaintiffs also seek to have this Court enjoin the above-named defendants in their official capacity from enforcing and executing the Act as to them and those that are similarly situated.

The matter is now submitted to the Court upon the motion of the defendants seeking to have this Court dismiss the complaint. This motion to dismiss raises the issues that the complaint fails to state a claim against these

defendants upon which relief can be granted and lack of jurisdiction insofar as this Court is concerned. More specifically, in their motion to dismiss, these defendants state that this Court, and any other court, does not have the authority or jurisdiction to declare void a duly and lawfully enacted statute of the State of Alabama fixing and determining the corporate limits of a municipality. The defendants argue that the fixing of boundaries of a municipal corporation in the State of Alabama is a matter for the Legislature of the State of Alabama, acting in accordance with the State Constitution and is not, in instances such as this, subject to the jurisdiction, the control, or the supervision of the Federal courts. The defendants argue, further, that it is outside the jurisdiction of the Federal courts to ascertain or inquire into, to question or determine the wisdom or the policy of the Legislature of the State of Alabama in fixing and determining the boundaries of a municipal corporation in this State.

[*Motion to Strike*]

The matter is also submitted upon the motion of these defendants seeking to have this Court strike plaintiffs' complaint upon the ground that the complaint is not in accordance with Rule 8(e) of the Federal Rules of Civil Procedure. In this motion, defendants state that the complaint contains matters that are redundant, immaterial, and impertinent. Generally, the matters set out in the complaint, of which defendants complain in their motion to strike, relate to the motive or motives of the Legislature of the State of Alabama in passing the Act in question.

On July 15, 1957, the Legislature of the State of Alabama, in its Regular Session, passed Special Act No. 140. This Act is entitled, "An Act To alter, rearrange, and re-define the boundaries of the City of Tuskegee in Macon County." The Act then describes in detail the territory the Legislature intends to be included within the municipality of Tuskegee, Alabama, and specifically excludes all territory lying outside such described boundaries. Prior to the passage of Act No. 140, the boundaries of the municipality of Tuskegee formed a square, and, according to the complaint the defendants seek to strike and dismiss, contained approximately 5,397 Negroes, of whom approximately 400 were qualified as voters in Tuskegee, and contained approximately 1310 white persons, of whom approximately 600 were qualified voters in said municipality. As the boundaries are redefined by said Act No. 140, the municipality of Tuskegee resembles a "sea dragon." The effect of the Act is to remove from the municipality of Tuskegee all but four or five of the qualified Negro voters and none of the qualified white voters. Plaintiffs state that said Act is but another device in a continuing attempt to disenfranchise Negro citizens not only of their right to vote in municipal elections and participate in municipal affairs, but also of their right of free speech and press, on account of their race and color.

[*Federal Rule 8(e) Interpreted*]

In connection with defendants' motion to strike plaintiffs' complaint upon the ground that it violates Rule 8(e) of the Federal Rules of Civil Procedure, it is the opinion of this Court that the question of whether a complaint or, for that matter, any pleading violates said rule is dependent upon the circumstances of the particular case. For one of the several recent cases upholding this proposition, see Atwood v. Humble Oil & Refining Company, 5th Cir., 1957, 243 F.2d 885. In other words, as to what is a short and plain statement of claim, as to what constitutes redundant, immaterial, or impertinent matters, within the meaning of this rule, depends upon the particular case involved. This Court is of the opinion that in this case the complaint does not violate Rule 8(e) and that defendants' motion to strike should be overruled and denied.

In passing upon the merits of defendants' motion to dismiss, it is first necessary to determine by what authority the Alabama Legislature in this instance acted. In this connection it appears that subsection 18 of § 104 of the Constitution of Alabama of 1901 authorizes the Legislature of the State of Alabama to pass acts such as Act No. 140 passed at the 1957 Regular Session. That particular section of the Constitution of Alabama reads as follows:

> "(18) Amending, confirming, or extending the charter of any private or municipal corporation, or remitting the forfeiture thereof; *provided, this shall not prohibit the legislature from altering or rearranging the boundaries of the city, town or village.*" (Emphasis supplied.)

The Supreme Court of the State of Alabama has the same authority insofar as the Constitu-

tion of the State of Alabama is concerned, that the Supreme Court of the United States has insofar as the Constitution of the United States is concerned. The authority of each court in interpreting and passing upon questions arising out of the respective Constitutions is supreme. See Willys Motors v. Northwest Kaiser-Willys, 142 F.Supp. 469 and the cases cited therein. The Supreme Court of the State of Alabama has held that the above-quoted part of the Constitution of Alabama permits legislation by local law concerning the alteration or rearrangement of cities, towns, or villages without regard to the general law on the subject. See City of Ensley v. Simpson, 166 Ala. 366, 52 So. 61, and State v. Gullatt, 210 Ala. 452, 98 So. 373. Thus this Court must and does now conclude that the Legislature of the State of Alabama had, under the Constitution of the State of Alabama and the interpretation of that Constitution by the Supreme Court of the State of Alabama, the authority to pass the Act in question.

[*Authority of Legislature*]

This Court must therefore now proceed to a determination of the question as to whether or not the legislature of a state, or the state acting through its duly elected legislature, may, within the limits of its authority and without any interference from the Federal courts, when there is no restraint on said acts specifically made by the Federal Constitution, pass an act such as Act No. 140 of the 1957 Regular Session of the Legislature of the State of Alabama. To put the question more concisely, can the legislature of a state arbitrarily change the territorial limits of a municipality within the state? There is a considerable amount of general law on the subject. The principles are stated in 16 C.J.S., Constitutional Law, page 706, and 37 Am. Jur., Municipal Corporations, page 652. However, it is not necessary for this Court to rely upon general propositions in deciding this particular question, since the Federal courts have been faced with similar questions for many years. One of the earlier cases, and possibly the leading case on the subject, is Laramie County v. Albany County, et al., 1875, 92 U.S. 307. In that case the Supreme Court of the United States, commenting upon the authority of the legislature to control political subdivisions within the state, said:

"Counties, cities, and towns are municipal corporations, created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the constitution of the State otherwise provides."

* * *

"Unless the Constitution otherwise provides, the legislature still has authority to amend the charter of such a corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic, or unjust, and even abolish the municipality altogether, in the legislative discretion. Cooley on Const., 2d ed., 192."

Further in the opinion the court stated:

"Opposition is sometimes manifested; but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable. [Cases cited]."

Approximately four years later, the Supreme Court of the United States was faced with a similar question in the case of Mount Pleasant v. Beckwith, 1879, 100 U.S. 514. Again the Supreme Court recognized the authority of the State, acting through its duly elected and convened legislative body, when it stated:

"Counties, cities, and towns are municipal corporations created by the authority of the legislature, and they derive all their powers from the source of their creation, except where the Constitution of the State otherwise provides."

* * *

"Corporations of the kind are composed of all the inhabitants of the territory included within the political organization, each individual being entitled to participate in its proceedings; but the powers of the organization may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic."

* * *

"Powers of a defined character are usually granted to a municipal corporation, but that does not prevent the legislature from exercising unlimited control over their charters. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether, in the legislative discretion, and substitute in their place those which are different. Cooley, Const. Lim., (4th ed.) 232."

Probably one of the most emphatic statements to come from the Supreme Court of the United States on this proposition is in the case of Hunter v. City of Pittsburgh, 1907, 207 U.S. 161, wherein the court stated:

"We have nothing to do with the policy, wisdom, justice or fairness of the act under consideration; those questions are for the consideration of those to whom the State has entrusted its legislative power, and their determination of them is not subject to review or criticism by this court."

In the Hunter v. Pittsburgh case, the court went on to state:

"We have nothing to do with the interpretation of the constitution of the State and the conformity of the enactment of the Assembly to that constitution; those questions are for the consideration of the courts of the State, and their decision of them is final."

[*Legislative Motive Immaterial*]

As to the allegations of the complaint concerning the motives of the Legislature of Alabama in passing the Act in question, the law is clear that the supremacy and absolute control as to the territorial boundaries of municipalities is vested in the legislative body of the State, regardless of the motive underlying the enactment. See Doyle v. Continental Ins. Co., 1876, 94 U.S. 535, wherein the Supreme Court stated:

"If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into."

* * *

"If the act done by the State is legal, is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law." (Emphasis supplied.)

Only recently the Doyle case was cited with approval by a three-judge district court sitting in Alabama when that court rendered its opinion in Shuttlesworth v. Birmingham Board of Education, D.C. Ala., 1958, 162 F.Supp. 372. That court, speaking through the Honorable Richard T. Rives, stated:

"In testing constitutionality 'we cannot undertake a search for motive.' 'If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into.' Doyle v. Continental Insurance Co., 94 U.S. 535, 541, 24 L. Ed. 148. As there is no one corporate mind of the legislature, there is in reality no single motive. Motives vary from one individual member of the legislature to another. Each member is required to 'be bound by Oath or Affirmation to support this Constitution.' Constitution of the United States, Article VI, Clause 3. Courts must presume that legislators respect and abide by their oaths of office and that their motives are in support of the Constitution."

[*Conclusions*]

Thus this Court must now conclude that regardless of the motive of the Legislature of the State of Alabama and regardless of the effect of its actions, insofar as these plaintiffs' right to vote in the municipal elections is concerned, this Court has no authority to declare said Act invalid after measuring it by any yardstick made known by the Constitution of the United States. This Court has no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama.

For the foregoing reasons, the motion of the defendants to strike this complaint upon the ground that it violates Rule 8(e) of the Federal Rules of Civil Procedure will be overruled and denied; the motion of the defendants to dismiss this action upon the grounds that the complaint fails to state a claim against these defendants upon which relief can be granted and that this

Court does not have any authority or jurisdiction to declare void this particular duly enacted statute of the State of Alabama will be granted.

A formal judgment will be entered in conformity with this opinion.

Done, this the 28th day of October, 1958.

JUDGMENT

The above-styled action was submitted to this Court upon the motion of the defendants seeking to have this Court strike the complaint in this action upon the ground that it violates Rule 8(e) of the Federal Rules of Civil Procedure, and also upon the motion of the defendants to dismiss this action upon the grounds that the complaint fails to state a claim against these defendants upon which relief can be granted and for lack of jurisdiction insofar as this Court is concerned.

Upon consideration of the above motions and for the reasons set forth in the memorandum opinion filed in this cause on October 29, 1958, and for good cause shown, it is the ORDER, JUDGMENT and DECREE of this Court that the motion of the defendants seeking to have this Court strike the complaint in this action upon the ground that it violates Rule 8(e) of the Federal Rules of Civil Procedure should be and the same is hereby overruled and denied.

It is the further ORDER, JUDGMENT and DECREE of this Court that the motion of the defendants seeking to have this Court dismiss this action upon the grounds that the complaint fails to state a claim against these defendants upon which relief can be granted and for lack of jurisdiction, insofar as this Court is concerned, should be and the same is hereby granted. It is ORDERED that this action be and the same is hereby dismissed.

It is the further ORDER, JUDGMENT and DECREE of this Court that all court costs incurred in this proceeding should be and they are hereby taxed against the plaintiffs, for which execution may issue.

Done, this the 31st day of October, 1958.

PUBLIC ACCOMMODATIONS
Private Clubs—New York

In the Matter of the Application of LAKE PLACID CLUB, Inc. v. Charles ABRAMS, individually and as Chairman of the New York State Commission Against Discrimination, and Blanche I. Lubow.

New York Supreme Court, Appellate Division, 3rd Department, November, 1958.

SUMMARY: The New York State Commission Against Discrimination was investigating a club's admission practice when a Jewish organization filed a complaint on behalf of a Jewish woman, charging the club with discrimination because of creed contrary to state statutes. The investigating commissioner found the club not to be a place of public accommodation and dismissed the complaint. Commission rules provide that application for reconsideration must be filed within 15 days after notice of dismissal is mailed. Seven days after the dismissal the organization wrote a letter to the commission chairman requesting an extension of time within which to decide whether to seek a reconsideration. The chairman, abroad at the time, did not return for several weeks, after which he classified the letter as an application for reconsideration. At this stage the club instituted prohibition proceedings against the commission chairman in the state trial court. The court granted prohibition on the grounds that the letter was not an application for reconsideration, that the time for filing such an application had expired, and that the chairman had no authority to waive the commission's rule. On appeal, the Appellate Division reversed and ordered the prohibition proceeding dismissed. The court held that, since no substantial legal right of the club was violated, the chairman had power to waive strict compliance with commission rules setting a time limit for reconsideration applications.

FOSTER, P. J.

By statute discrimination based on race, color, creed or national origin is forbidden in this State in places of public accommodation, resort or amusement. Private clubs are excepted from the ban of the statute (Executive Law, Secs. 292, 296). A Commission has been set up to enforce the provisions of the statute and such Commission is empowered to establish its own rules of practice. This appeal brings up for determination the power of the Chairman of the Commission to waive strict compliance with one of the rules of the Commission relative to the reconsideration of a decision made by one Commissioner.

In May 1955 the Commission initiated an investigation of the admission policy of the petitioner Lake Placid Club, Inc., to determine whether it is a place of public accommodation within the purview of the statute, and assigned a Commissioner for that purpose. During the pendency of the proceeding the Anti-Defamation League of B'nai B'rith filed a complaint against petitioner on behalf of appellant Lubow charging petitioner with a discriminatory practice against her based on her creed. This complaint was also assigned to the same Commissioner and became part of the proceeding aforesaid. After an investigation such Commissioner found that petitioner was not a place of public accommodation, resort or amusement within the contemplation of the statute. While we do not reach the merits of that issue on this appeal it may be parenthetically observed that the controversy hinged upon the propositions that two entities were involved, the petitioner Lake Placid Club, Inc. and the Lake Placid Company; and upon the fact that conventions were entertained on the premises of the petitioner with the use of its facilities.

[*Copy of Decision*]

A copy of the decision of the Commissioner dismissing the complaint was mailed to appellant Lubow on July 18, 1957, but no copy was mailed to the B'nai B'rith although concededly it was the usual practice of the Commission to furnish a copy of its determination to organizations when they acted in behalf of complainants. On the day after the decision was mailed the term of office of the Commissioner who made the decision expired. On July 22, 1957 B'nai B'rith attempted to get a copy of the decision from the Commissioner but did not receive one. On July 25, B'nai B'rith wrote to the Chairman of the Commission complaining of its failure to get a copy of the decision and requested an extension of time within which to advise appellant Lubow whether to seek reconsideration. The Chairman was out of the country and apparently no one was authorized to act on his behalf during his absence. Upon August 21 he returned and a short time thereafter he determined that B'nai B'rith's letter requesting an extension of time was sufficient in form and substance to constitute an application for reconsideration. After receiving B'nai B'rith's memorandum on the subject he gave petitioner's counsel an opportunity to answer the same. No actual determination as to whether reconsideration should be had was made before petitioner instituted the proceeding under review, under Article 78, Civil Practice Act, to prohibit further action on the part of the Chairman and the Commission. It was decided at Special Term that B'nai B'rith's letter of July 25 was not an application for reconsideration; that the time to file such an application expired on August 6th and that the Chairman had no authority to extend the time or waive the rule of the Commission with relation to reconsideration. From the order entered thereon appellants have appealed.

The rule in question, adopted by the Commission pursuant to its rule making power as provided by statute, is Rule No. 4, and reads as follows:

"4. Reconsideration by the Chairman.

The complainant may apply to the Chairman for reconsideration of the dismissal of his complaint or of the terms of conciliation, as the case may be. Such application must be in writing, state specifically the grounds upon which it is based and be filed within 15 days from the date of the mailing of the notice of disposition in the office of the Commission where the complaint was previously filed.

If such application for reconsideration is made, the Chairman shall review the entire file, and may, in his discretion, hear the parties. The Chairman, in his discretion, shall grant or deny the application for reconsideration. If the Chairman grants the application for reconsideration, he shall remit the matter, together with his recommendations, to the Investigating Commissioner for further action, if any."

It should be noted that in his decision, mailed to appellant Lubow, the Commissioner who made the determination stated the essence of the rule as to an application for reconsideration. It should also be noted that if it was error for the Special Term to find that the letter from B'nai B'rith of July 25 was not an application for reconsideration then there is no issue as to a waiver of the rule, for such letter was mailed well within the 15 day period stated in the rule. We prefer however to go to the larger issue of waiver, and to agree with Special Term that if the words used in the letter are accorded their ordinary meaning the letter merely requested an extension of time. The narrow issue is then presented as to the Chairman's power to waive the time limit of the rule and to consider the request of September 13 for reconsideration. This request was made by B'nai B'rith some 57 days after the determination of the investigating Commissioner was made.

There are cogent arguments for and against the power of waiver by administrative bodies of their own rules, apparently dependent upon the circumstances involved. Generally speaking rules of administrative agencies which regulate procedure affecting substantial rights of individuals may not be waived. (People ex rel. Jordan v. Martin, 152 N.Y. 311; Matter of O'Brien v. Delaney, 255 App. Div. 385, affd. 280 N.Y. 697; Matter of Jordan v. Wiener, 259 App. Div. 1068; Service v. Dulles, 354 U.S. 363). Rulings which do not affect substantial rights of individuals, the waiver of which would not be prejudicial, may be relaxed when the ends of justice require it (Matter of Molinari v. Quayle, 300 N.Y. 55; National Labor Relations Board v. Monsanto Chemical Company, 205 F.2d 763; Davis on Administrative Law, Sec. 56; Forkosch, Administrative Law, Sec. 227).

[*No Substantial Right Violated*]

We are constrained to the belief that no substantial legal right of petitioner by the action of the Chairman of the Commission was violated or impaired. Had the Chairman been at home instead of abroad, or had delegated his duties to another Commissioner, the letter from B'nai B'rith on July 25 would have undoubtedly been answered promptly, and had the requested extension been denied there still would have been time to apply for reconsideration before the expiration date of the 15 day period on August 6. Had such reconsideration been granted petitioner could not validly have claimed prejudice; and as we view it, no real prejudice to petitioner resulted from what actually occurred. The Chairman's determination was simply to undertake whether consideration should be had, and in the event he grants it petitioner is merely required to argue again that the complaint is unfounded. Even in civil suits, and under the Civil Practice Act and the Rules of Civil Practice, the courts have a rather wide latitude to relieve defaults in pleadings and in judgments and very liberal principles as to relief by the courts from time limitation are expressed in Section 98 of the Civil Practice Act. These practices and principles we think should apply with even greater force to proceedings before an administrative and quasi judicial officer, like the Chairman of a Commission, where the Commission is charged with the enforcement of a public policy formally adopted by the State. We do not regard the application for reconsideration as akin to a notice of appeal from a judgment or order in a civil action with the finality which a failure in that regard portends. We are therefore also constrained to hold that on the broad issue of waiver the Chairman of the Commission for good cause, and especially under the circumstances disclosed, had power to waive strict compliance with rule No. 4 of the Commission, and to entertain the application for reconsideration. We express, of course, no opinion as to the merits of the application for reconsideration but we may also add that if reconsideration is granted, and despite the fact that the Commissioner who decided the matter is now out of office, it is our view that the Chairman has implied power under the rule to remit the matter to another Commissioner.

The order should be reversed and the proceeding dismissed.

PUBLIC ACCOMMODATIONS
Taverns—Michigan

Marie SCRUGGS, Roma Lawson, and Johnnie Mae Fritz v. Josephine BORGMAN and Joan B. Lee, d/b/a Pontchartrain Wine Cellars.

Circuit Court in Chancery, Wayne County, Michigan, April 14, 1958, No. 569, 469.

SUMMARY: A state court in Detroit, Michigan, was asked to enjoin a tavern operator from violating statutes guaranteeing all persons equal privileges in restaurants and other places of public accommodation within the state. Those statutes provided for criminal penalties and treble civil damages. The court issued a temporary restraining order, prohibiting defendants from denying plaintiffs equal privileges in the public service of food or refreshments, and an order to show cause. Following a hearing on the latter order, the court found that injunctive relief was available notwithstanding the absence of an express provision in the statute to that effect, where money damages are not adequate or appropriate. The court felt that neither a criminal penalty nor damages at law were apt to result in "acceptance and enjoyment of association and society without regard to color," whereas temporary injunctive relief would prevent a recurrence of the alleged offense until a trial upon the merits. The court expressed the hope that in the meantime agencies such as the Detroit Commission on Community Relations, "private persons of good will," and the court itself, might accomplish a reconciliation of the litigants. The temporary restraining order and order to show cause, and the opinion and order granting the temporary injunction are reproduced below.

BOWLES, Circuit Judge.

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

IT IS ORDERED that the defendants herein be and appear before this Court on the 21st day of February A.D. 1958, at 3 P.M., o'clock on that day or as soon thereafter as counsel can be heard to show cause, if cause they have, why they and each of them should not be enjoined from continuing to violate Sections 28.343, 28.344 of the Michigan Statutes Annotated, pending the final determination of this matter as prayed in the prayer of the Bill of Complaint filed herein; and

IT IS FURTHER ORDERED that the defendants and each of them, their agents and servants be, and they hereby are restrained from continuing to attempt to embarrass or humiliate plaintiffs or any other persons within the jurisdiction of this state and similarly situated by refusing or denying to them the full and equal accommodations, advantages, facilities and privileges of their place of public accommodation so owned and operated or maintained by defendants or either of them within the jurisdiction of this state and where food or refreshments are or may hereafter be served subject only to the conditions and limitations established by law and applicable alike to all citizens with uniform prices, pending the hearing upon this Order to Show Cause, or until the further order of this Court, and

IT IS FURTHER ORDERED that service of this Order, together with a copy of the Bill of Complaint upon which it is based, be served upon defendants Josephine Borgman and Joan B. Lee at least four days prior to the hearing upon said Order to Show Cause.

Feb. 14, 1958

* * *

OPINION-RE: TEMPORARY INJUNCTION

This matter came on for hearing on an Order to Show Cause why the defendants should not be enjoined from continuing to violate Sections 28.343 and 28.344 of Michigan Statutes Annotated, pending the final determination of the matter. Testimony was taken and argument had. Briefs were filed.

[*Applicable Statute*]

The controlling statute reads:

"Sec. 28.343. Equal accommodations, etc., at restaurants, etc. Sec. 146. All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of inns, hotels, motels, government housing, restau-

rants, eating houses, barber shops, billiard parlors, stores, public conveyances on land and water, theatres, motion picture houses, public educational institutions, in elevators, on escalators, in all methods of air transportation and all other places of public accommodation, amusement, and recreation, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices."

"Sec. 28.344 Penalty; treble damages; revocation of license. Sec. 147. Any person being an owner, lessee, proprietor, manager, superintendent, agent or employee of any such place who shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, facilities and privileges thereof or directly or indirectly publish, circulate, issue, display, post or mail any written or printed communications, notice or advertisement to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed or color or that any particular race, creed or color is not welcome, (is) objectionable or not acceptable, not desired or solicited, shall for every such offense be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than $100.00 or imprisoned for not less than 15 days or both such fine and imprisonment in the discretion of the court; and every person being an owner, lessee, proprietor, manager, superintendent, agent or employee of any such place, and who violates any of the provisions of this section, shall be liable to the injured party, in treble damages sustained, to be recovered in a civil action: Provided, however, that any right of action under this section shall be unassignable. In the event that any person violating this section, or any municipal authority, the court, in addition to the penalty prescribed above, may suspend or revoke such license."

[*Common Law*]

In Ferguson v. Gies, 82 Mich. 359, the Michigan Supreme Court in 1890 held, among other things:

"The common law as it existed in this state before the passage of this statute, and before the colored man became a citizen under our constitution and by-laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public place. It must be considered that, when this suit was planted, the colored man, under the common law of this state, was entitled to the same rights and privileges in public places as the white man and he must be treated the same there;

"and that his right of action for any injury arising from an unjust discrimination against him is just as perfect and sacred in the courts as that of any other citizen. This statute is only declaratory of the common law, as I understand it now to exist in this state.

"Any discrimination founded upon the race or color of the citizen is unjust and cruel, and can have no sanction in the law of this state * * *."

The court held that under Act No. 130 of the Laws of 1885 as well as under the common law, the plaintiff might recover damages, and in such a suit, the party thus discriminated against need not declare upon or refer to the statute. The statute in Section 2 had provided for a fine not to exceed $100 or imprisonment of not more than 30 days, or both, for violation of the right to full and equal accommodations.

[*The Bolden Case*]

In Bolden v. Grand Rapids Corporation, 239 Mich. 318, the court construed Act No. 130 of the Public Acts of 1885, as amended by Act No. 375 of the Public Acts of 1919, holding that a Negro who was refused a ticket to a public theater in violation of the Act had a right of action for damages although the statute was a criminal one and did not in terms confer that right. The court ruled:

"While the statute here under consideration applies to all persons, the duty imposed on the defendant under it has application only to those who may apply for admission. They alone are concerned in its violation, they are the only ones who can suffer injury by reason thereof. It therefore seems clear to us that a person denied admission in violation of its provisions has a

right of action for such damages as he sustained thereby."

[*Protection of Personal Rights*]

It would appear that the law is now well-settled that a court of equity will exercise its jurisdiction in appropriate instances for the protection of personal rights and that the power of equity is not limited to situations in which a property right is involved. There are limitations on the exercise of this jurisdiction, and it must be conceded there are many situations in which equity will not intervene. Where a denial is made, under the modern rule, it may more likely be made, not on the ground that equity will not protect personal rights, but because the asserted right in question is not one recognized by the courts as entitled to protection either at law or in equity. See, 1957 Cumulative Supplement to Vol. 28, American Jurisprudence, pages 80 and 81. See Orloff v. Los Angeles Turf Club, 180 Pacific 2nd 321; 171 ALR 913, and 175 ALR 459.

In the Orloff case the court reasoned:

> "The issue should not in logic or justice turn upon the sole proposition that a personal rather than a property right is involved. To so reason is to place property rights in a more favorable position than personal rights, a doctrine wholly at odds with the fundamental principles of democracy. These concepts of the sanctity of personal rights are specifically protected by the constitution, both state and federal, and the courts have properly given them a place of high dignity and worthy of special protection * * *."

[*Availability of Injunctive Relief*]

The first question to be determined is whether injunctive relief may be had under the Michigan Statute and under the decided cases before our Supreme Court. It will be observed readily that Michigan recognized a common law right before the enactment of any statute declaratory of that common law, and that a damage action would lie under the common law and might be enforced also under the statute, although it was a criminal statute and did not anywhere make reference to the right to damages. The rule of liberal construction has applied, therefore, in Michigan civil rights cases. There are no holdings however, on injunctive relief. It is noted in passing that my distinguished colleague, the Honorable Robert M. Toms, in Taylor v. Hallis, in 1956, relied upon Everett v. Harron, 38 Pa. 123, and Orloff v. Los Angeles Turf Club, *supra*, in holding that damages were inadequate as a remedy adopting the principles stated in these cases as the rule in the case before him.

10 Am. Jur., 1957 Cumulative Supplement, page 122, recites:

> "And in fact, in most of the cases in which the question has arisen, the view has been taken that a person aggrieved by the violation of a civil rights statute is entitled to pursue a remedy which will effectively reimburse him or relieve him from the effects of the violation or protect him against further violation, notwithstanding the statute did not expressly give him such right or remedy."

Similarly, the right to maintain in a suit to enjoin the violation of a civil rights statute has been recognized in a number of cases notwithstanding the statute made no express provisions therefor. See McCabe v. Atchison, Topeka & Santa Fe Railway Co., 235 U.S. 151. In several recent cases federal courts have sustained the existence of jurisdiction in equity to protect personal constitutional rights allegedly sought to be invaded by state activities having the effect of denying the equal protection of the laws. See 175 ALR 472.

It has been held that injunctive relief is available notwithstanding the statute does not expressly so provide, at least where no other adequate remedy is available.

[*Adequacy of Damages*]

The historical touchstone of equity jurisdiction has been the inadequacy of law, more particularly the recovery of damages. The question finally becomes here whether or not a damage action is adequate or whether a more appropriate, full and complete remedy may be had in equity.

As a practical consideration, when proofs are offered in such cases, compensable damages are most difficult, if not impossible, to prove and to measure, and more fundamentally, it would appear that the recovery of damages is not the appropriate relief. For, in a case where a civil rights violation is established, it is the sensibilities of the plaintiffs that are injured;

it is the sense of personal humiliation that hurts; it is the feeling of not being wanted that tests patience and restraint.

The recovery of damages, and particularly punitive damages, as provided under the Michigan statute, in my judgment, is neither an adequate nor appropriate remedy. What is sought in law is the enforcement of a right, but what should be achieved is acceptance and enjoyment of association and society without regard to color. Damages themselves will not achieve this result. The result may be achieved eventually by a reconciliation between the litigants and by an understanding between them that obviates even the possibility of a recurrence of the offense.

There is a further practical consideration. While it may be urged with some persuasion that a criminal statute is a sort of continuing injunction, the criminal court, and its formal proceedings, at best, are not likely to contribute to a genuine heartfelt reconciliation between the litigants. Indeed, the criminal proceedings are likely to aggravate and intensify the sense of conflict.

Further, injunctive relief prevents, under the beneficent arm of a court of equity, a recurrence of the alleged offense until such time as the matter may be satisfactorily settled or a trial had upon the merits.

This has something additional to commend it. For while the injunction is operative, preventing a recurrence of the alleged violation, tempers may subside and reason and persuasion may hold sway. Those agencies that are especially equipped to handle situations of such delicacy can go into action as well as private persons of good will. The Fair Employment Practices Commission and the Commission on Community Relations of the City of Detroit are ideally equipped to fill the vacuum and to use their good offices in the way of mediation of the controversy.

The Court, too, is available in a mediatory capacity to bring the parties together and under the rules and practices of this court, the Chancellor has freedom of action, since he, in all probability, will not be called upon to try the case on the merits.

In the field of industrial conflict, experience has shown that trained peacemakers may accomplish the well-nigh impossible in bringing contestants to a point of reconciliation and final settlement. Particularly in the State of Michigan through its appropriate agency, the Labor Mediation Board, have representatives of labor, industry and the general public come to look upon the non-coercive, benign function of voluntary mediation as affording one of the best techniques for the avoidance and/or settlement of costly conflict. Too, the successful mediation efforts of U.N. representatives, such as Dr. Ralph Bunche and Dr. Frank Graham, as well as the late Count Felix Bernadotte, have pointed the way to the practicability of mediation in international disputes. Particularly should this be true in the civil rights case, where extreme tact and understanding, and even the passage of time itself (referred to in labor disputes as a 'cooling off' period) afford the best hope, perhaps, of orderly advancement. This is not to say that a resort to the courts is unwise; rather, it is to say that if there is resort to the courts the full equity powers, including the use of the injunction, are, to this Court, more appropriate and adequate than resort to the criminal law, or even to a suit for damages.

[*Ruling on Instant Case*]

The testimony established, in the judgment of the Court, that a serious disagreement and/or misunderstanding occurred between the parties to this action at the time when the plaintiffs sought service at defendants' establishment and did not accomplish such service. It will be for the trial court to determine precisely what happened and the responsibility therefor. But, on the hearing a sufficient showing was made to impel the Court to the conclusion that pending settlement or hearing upon the merits, an injunction should issue stabilizing relations between the parties and preventing any recurrence of the incident which led to this suit.

For the reasons hereinbefore stated, the Court will approve an injunction pending trial.

George E. Bowles
Circuit Judge

April 4, 1958

* * *

ORDER GRANTING INJUNCTION

At a session of said Court, held at the City-County Building, in the City of Detroit, County of Wayne and State of Michigan,

This matter having come on to be heard on an Order to Show Cause why defendants should not be enjoined from continuing to violate

Sections 28.343-28.344, of the Michigan Statutes Annotated, and Compiled Laws of 1948, 750.146-750.147, and testimony having been taken and counsel for the respective parties having argued the case and briefs having been filed herein, and the Court being fully and duly advised in the premises;

ON MOTION OF TAYLOR, PATRICK, BAILER & LEE, Attorneys for Plaintiffs,

IT IS ORDERED that a temporary injunction be, and the same is hereby issued restraining the defendants, their agents, servants and employees from violating the aforementioned statute in accordance with the Prayer of Paragraph 2 of the Bill of Complaint.

George E. Bowles
Circuit Judge

April 10, 1958

RACE RELATIONS
Grand Juries—Georgia

SUMMARY: The Fulton County, Georgia, grand jury issued a special presentment dealing with race relations in Atlanta on December 6, 1958. The text is reproduced below.

We, the Grand Jury of Fulton County, charged with representing the interests of all citizens, deplore the situation now existing between the white and Negro citizens of our community. Especially are we apprehensive of the economic chaos which will inevitably result, if the current impasse in racial relations is not soon resolved.

A racial curtain has descended upon our community, effectively shutting off communication between prominent citizens of both races, who should be mutually examining our problems in a spirit of lenity and sufferance.

During the past weeks the grand jury has discussed with various representative members of both races the economic consequences of our existing situation. From these discussions we have ascertained that there exist areas where communication can be established and maintained.

We urge therefore that immediate and positive action be taken to implement the creation of permanent committees to be composed of white and Negro citizens to meet as agreed.

From our discussions with citizens of prominence we have further ascertained that, in large measure, the white citizens feel that the direction of our local affairs is being guided by outside interests. These interests being unable to solve their own problems are determined to impose upon our community a way of life unacceptable to the majority of our people. On the other hand, the Negro leaders feel that they do not have adequate means of communication to present their views on various problems concerning their economic life. We must solve our problems among ourselves, based upon the thinking and acceptance of our own community.

Let us offer for the consideration of the Negro segment of our community the following observation: In the history of the white English-speaking race, never has there been imposed upon them for long, a statute or way of life from without, which is fundamentally objectionable to a majority of the citizens. If progress is to be made, it must be progress based upon the independent thinking of a majority of the local community.

In our democracy, a minority may briefly win a Pyrrhic victory, but at what cost? Illiteracy for the children of both races; juvenile delinquency beyond the scope of our understanding, with 110,000 children wandering the streets without occupation or restraint, and economic stagnation and chaos during which the Negro race would suffer in greater degree than the white.

We call on citizens of both races to be temperate in their thinking so that we may evolve a pattern of life, over the longer future, which will insure tranquility for ourselves and opportunity for our children.

We believe that the committee should be representative of all sectors and facets of our community and be dominated by none. Those with the greatest stake in our efforts to make progress are the children themselves. We urge that elected public officials refrain from name

calling and inflammatory statements. That, in the light of recent judicial decisions, they realistically examine their positions and, if found untenable, they seek to guide our citizens to find workable solutions to our problems. Time is of the essence.

We, the grand jury, being temporarily in office, feel that to assure continuity of effort to solve our problems on a local basis, an established and representative organization should volunteer to carry forward the work of these committees. We feel that the Atlanta Chamber of Commerce contains the necessary foresight and leadership to take over this project and urge that they immediately establish themselves organizationally to provide the facilities and to implement the selection of committees. We further suggest that these committees function as completely independent units. That they would not be dominated by any one organization or any one group. That the scope and nature of the committee's work be left in the hands of the committees so chosen, for their independent actions.

Atlanta, through the decades, has become one of the world's great cities due to that intangible asset—leadership. The crisis faced today demands leadership emanating from the ranks of both races. There must exist such a reservoir of far-seeing leadership among our citizens. It is time for men of good heart to be heard so it can be said, "The men and the hour have met."

SPORTS
Interracial—Louisiana

Joseph DORSEY, Jr. v. STATE ATHLETIC COMMISSION.

United States District Court, Eastern District, Louisiana, New Orleans Division, November 28, 1958, Civil Action No. 5247.

SUMMARY: A Negro prizefighter in a class suit in federal court asked for a declaratory judgment and an injunction to restrain the Louisiana State Athletic Commission from enforcing its regulation and a state statute [1 Race Rel. L. Rep. 953 (1956)] prohibiting athletic contests between Negroes and white persons. Admitting that it would not allow plaintiff to engage in a mixed prizefight in Louisiana, defendant contended that the court lacked jurisdiction since the suit was in effect against the state contrary to the Eleventh Amendment. The court rejected this contention for the reason that a state agent ceases to represent the state for purposes of the Eleventh Amendment when state power is used in violation of the United States Constitution. The court also held that it was not necessary to sue commission members individually where relief was sought from action by the collective agent. On the merits the court held the challenged regulation and statute on their face violative of the Equal Protection Clause of the Fourteenth Amendment. The court said such segregation could not be justified under the state's police power and issued a temporary injunction. The court's opinion and formal judgment decree follow. [See also, *State ex rel. Dupas v. New Orleans*, 3 Race Rel. L. Rep. 80 (1957); 3 Race Rel. L. Rep. 510 (1958)].

Before WISDOM, Circuit Judge, and CHRISTENBERRY and WRIGHT, District Judges.[1]

WISDOM, Circuit Judge.

Joseph Dorsey, Jr. is a negro prizefighter. He brings this suit in his own behalf and in behalf of all other negro professional prizefighters similarly situated. He asks for a declaratory judgment and an injunction to restrain the Louisiana State Athletic Commission from enforcing a regulation and a statute prohibiting athletic contests between negroes and whites.

The State Athletic Commission is an agency of the State of Louisiana with "full authority,

1. 28 USCA 2284.

regulation, and control over all boxing and wrestling contests or exhibitions in the state". La. R.S. 1950, 4:61; Act. 336 of 1950.

Rule 26 of the Rules and Regulations adopted by the Commission provides:

> "There shall be no fistic combat match, boxing, sparring, or wrestling contest or exhibition between any person of the Caucasian or 'white' race and one of the African or 'negro' race; and, further, it will not be allowed for them to appear on the same card."

Dorsey's original petition, filed July 28, 1955, attacked Rule 26 as unconstitutional. In 1956 the Louisiana legislature enacted Act 579 (La. R.S. 4:451 et seq.). This law prohibits "interracial activities involving personal and social contacts", including "games, sports or contests", and requires separate seating at any entertainment or athletic contest. May 24, 1957 Dorsey filed an amendment to his petition, attacking the constitutionality of Section 1 of this law.[2] Section 1 of the Act reads:

> "§ *451. Interracial activities involving personal and social contacts prohibited*
> All persons, firms and corporations are prohibited from sponsoring, arranging, participating in, or permitting on premises under their control any dancing, social functions, entertainments, athletic training, games, sports or contests and other such activities involving personal anl social contacts, in which the participants or contestants are members of the white and negro races. Acts 1956, No. 579, § 1."

There is no factual dispute. Dorsey was issued a license for 1957. He has no license for 1958, but the Commission's policy is to issue a license to a prizefighter only on the date of a scheduled fight and then only after the fight has been held and the boxer's license fee deducted from his share of the purse. The Commission admits the essential allegations of Dorsey's complaint and admits also that it would not allow Dorsey to engage in a mixed prizefight in Louisiana.

I.

The Commission contends that the court has no jurisdiction, on the ground that Dorsey's suit is in effect a suit against the State of Louisiana; and the Eleventh Amendment protects a state against being sued without its consent. In any event, the Commission argues, the plaintiff must sue state officials in their individual capacity; citing Ex Parte Young, 1908, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed 714. Here, Dorsey has not sued members of the Commission individually.

This question has been raised in several segregation suits. See School Board of Charlottesville v. Allen, 4 Cir., 1956, 240 F.2d 59. This Court dealt with the problem in Orleans Parish School Board v. Bush, 5 Cir., 242 F.2d 156, cert. den., 1957, 354 U.S. 921, 77 S.Ct. 1394, 1 L.Ed. 2d 1435. The short answer to the Commission's contention is that Dorsey's suit is not against the State of Louisiana, in name or in effect. It does not attempt to compel state action, but to prevent illegal action of the Commission. As Judge Tuttle stated in the Bush case: "If in fact the laws under which the Board here purports to act are invalid, then the Board is acting without authority from the state and the state is nowise involved." A state can act only through agents. Whether the agent is an individual official or a Commission, the agent ceases to repre-

2. The other sections of Act 557 are:
"§ 452. Separate seating and facilities
At any entertainment or athletic contests, where the public is invited or may attend, the sponsors or those in control of the premises shall provide separate seating arrangements, and separate sanitary, drinking water and any other facilities for members of the white and negro races, and to mark such separate accommodations and facilities with signs printed in bold letters. Acts 1956, No. 579, § 2.
"§ 453. Races prohibited from using the others seating and facilities
White persons are prohibited from sitting in or using any part of seating arrangements and sanitary or other facilities set apart for members of the negro race; and members of the negro race are prohibited from sitting in or using any part of seating arrangements and sanitary or other facilities set apart for white persons. Acts 1956, No. 579, § 3.
"§ 454. Penalty
Any person, firm or corporation violating the provisions of this chapter shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than $100.00 or more than $1,000.00 and imprisoned for not less than 60 days nor more than 1 year. Acts 1956, No. 579, § 4.
"§ 455. Construction; effective date; religious gatherings exempt
This chapter is passed in the exercise of the state police power to regulate public health, morals and to maintain peace and good order in the state and shall be so construed. This chapter shall not become effective until the fifteenth (15th) day of October 1956. None of the provisions of this chapter shall be construed to apply to religious gatherings, services or functions. Acts 1956, No. 579, § 5."

sent the state when state power is used in violation of the United States Constitution.

There is no merit to the defendant's contention that the plaintiff should have sued the members of the boxing Commission individually. We agree with the court in School Board of Charlottesville v. Allen that, "if high officials of the state and federal government may be restrained and enjoined from unconstitutional action, we see no reason why a school board [or any other state Commission] should be exempt from such suit merely because it had been given corporate powers." In Browder v. Gayle, 142 F.Supp. 707, aff'd 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114, the court indicated that it is not necessary to sue the members of a Commission individually when no special relief is sought against them by way of damages. In the case before us the plaintiff is seeking relief from action of the state's agent, the State Athletic Commission, in its collective capacity as a commission.

II.

In the School Segregation Cases, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, the Supreme Court held that classification based on race is inherently discriminatory and violative of the Equal Protection Clause of the Fourteenth Amendment. This principle, originally stated with respect to children in public schools, has been applied to golf courses,[3] parks,[4] beaches and swimming pools,[5] and buses and streetcars.[6] The application of the principle does not depend purely upon the fact that the school or the park is publicly owned; it rests on the fact that the discriminatory classification is enforced by state officials or state agencies. The Supreme Court has consistently defined state action as including action of any agency of the state at any level of government.[7]

The Commission relies on the argument that the rule and statute were adopted under the State's police power as a necessary measure to preserve peace and good order. Section 5 of Act 579 expressly states that: "This action is passed in the exercise of the State police power to regulate public health, morals and to maintain peace and good order in the State and shall be so construed." The same argument was made in Orleans Parish School Board v. Bush. Judge Tuttle for the Court of Appeals for the 5th Circuit rendered the argument:

> "The use of the term police power works no magic in itself. Undeniably the States retain an extremely broad police power. This power, however, as everyone knows, is itself limited by the protective shield of the Federal Constitution."

Dawson v. Mayor and City Council of Baltimore was a suit by negroes to enjoin enforcement of segregation at public beachhouses and bathhouses maintained by State and City authorities. The City of Baltimore argued that separation of races in public parks and beaches was customary in Maryland and necessary for the preservation of order. The Court of Appeals for the 4th Circuit held: "It is now obvious however that segregation cannot be justified as a means to preserve the public peace merely because the tangible facilities furnished to one race are equal to those furnished the other."

The principles set forth in Orleans Parish School Board v. Bush, and Dawson v. Mayor and City Council of Baltimore are not confined to opinions in the Federal Reporter. Harvey v. Morgan [8] is a Texas case that is strikingly similar to the instant case. The Texas Penal Code prohibited "any fistic combat, match boxing, sparring or wrestling contest or exhibition between any person of the Caucasian or White race and one of the African or Negro race." This language is identical with the language in Rule 26 adopted by the State Athletic Commission of Louisiana. "Sporty" Harvey, a negro boxer, sued the Commissioner charged with administering the Act, seeking a declaratory judgment and mandatory injunction. The Court held that the Commissioner's rules and the Texas statute prohibiting white-negro fights constituted state action in violation of the Fourteenth Amendment and the Federal Civil Rights Act. The Texas Court conceded that professional boxing is an activity

3. Holmes v. City of Atlanta, 5 Cir., 1955, 223 F.2d 93.
4. Department of Conservation v. Tate, 4 Cir., 1956, 231 F.2d 615.
5. City of St. Petersburg v. Alsup, et al., 5 Cir., 1956, 238 F.2d 830; Dawson v. Mayor anl City Council of Baltimore City, 4 Cir., 1955, 220 F.2d 386, aff'd 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774.
6. Morrison v. Davis, et al., 5 Cir., 1958 ..... F.2d ; Browder v. Gayle, 1956, 142 F.Supp. 707, aff'd 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed. 2d 114.
7. Virginia v. Rives, 1880, 100 U.S. 313, 25 L.Ed. 667; B & Q Railroad v. Chicago, 1897, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979; In Re Estate of Stephen Girard, 1957, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed. 2d. 792.
8. Ct. Civ. App. Tex., 1954, 272 S.W. 2d 621.

subject to rigid regulation under police powers reserved to the State, but observed that "every state power, however, including the police power is limited by the inhibitions of the Fourteenth Amendment. . . . Even if riotous conditions did result from mixed boxing exhibitions we doubt if this statute would be sustained by the Federal Supreme Court in view of language which we find in some of its opinions."

III.

Act 579 does not raise difficult issues involving the meaning of a law or the unconstitutional application of a statute apparently constitutional. Act 579 is not intended to circumvent desegregation by clever verbiage or by adroit administrative techniques. Act 579 is in the teeth of the School Segregation Cases and other cases stemming from that decision; a clear challenge to the validity of those cases when a state legislature invokes the police power. In these circumstances this Court must hold with the plaintiff that, as to athletic contests, Act 579 of 1956 is unconstitutional on its face in that separation of negroes and whites based solely on their being negroes and whites is a violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. Rule 26 is of course no less unconstitutional.

We hold therefore that the plaintiff and other Negro prizefighters similarly situated are entitled to a temporary injunction restraining the State Athletic Commission of Louisiana from enforcing its Rule 26 and Act 579, insofar as Rule 26 and Act 579 prohibit the plaintiff and other negro fighters from engaging in boxing contests with white fighters or appearing on the same card with white fighters.

JUDGMENT OF INJUNCTION

This cause came on for hearing on application of the plaintiff for a declaratory judgment and a temporary injunction. The Court, having carefully considered the arguments of counsel and the record made in this cause, and being of the opinion that the plaintiff should be granted the relief prayed for in his complaint:

IT IS ORDERED, ADJUDGED, AND DECREED that Rule 26 of the Rules and Regulations of the State Athletic Commission of Louisiana and Act 579 of 1956 of the Louisiana State Legislature (La. R.S. 4:451 et seq.) are unconstitutional insofar as they attempt to prohibit athletic contests between negroes and whites based solely on the contestants' race or color.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the defendant, State Athletic Commission, its officers, agents, servants, employees, and attorneys, and their successors in office, and those in concert with them who shall receive notice of this order, be and they are hereby restrained and enjoined from enforcing Rule 26 of the Rules and Regulations of the State Athletic Commission or any similar rule now or in the future enacted by the State Athletic Commission, and also from enforcing Act 579 of 1956 (La. R.S. 4:451 et seq.) insofar as the rules of the Commission and Act 579 attempt to prohibit the plaintiff or other negroes similarly situated from engaging in boxing contests and exhibitions with white fighters or appearing on the same card with white fighters solely on account of the fighters or contestants' race or color.

Jurisdiction of this cause is retained for the purpose of giving full effect to this judgment and for the purpose of making such further orders and decrees, or taking such further action, if any, as may become necessary or appropriate to carry out and enforce this Court's judgment.

THUS DONE AND SIGNED at New Orleans, Louisiana, on this 28th day of November, 1958.

John Minor Wisdom
United States Circuit Judge
Herbert W. Christenberry
United States District Judge
J. Skelley Wright
United States District Judge

TRANSPORTATION
Passenger Seating—Alabama

Viola CHERRY, et al. v. J. W. MORGAN, Eugene Connor, J. T. Waggoner, Individually, and as Members of the Board of City Commissioners of the City of Birmingham, Alabama, and Birmingham Transit Company, a corporation.

United States District Court, Northern District, Alabama, Southern Division, October 30, 1958, Civil Action No. 8622.

SUMMARY: A complaint filed in a federal district court in Alabama, requesting declaratory and injunctive relief, alleged that certain Birmingham ordinances relating to segregation in transportation were unconstitutional on their face. Subsequently certain other ordinances were adopted in October, 1958, repealing the challenged ordinances; authorizing carriers to make such regulations for the seating of passengers as are "reasonably necessary to assure the speedy, orderly, convenient, safe and peaceful handling of passengers;" and making refusal to obey a driver's seating request a criminal offense. Plaintiffs' motion to file a supplemental complaint challenging the constitutionality of the newly-adopted ordinances was disallowed. In reply to defendants motion to dismiss the action as moot, plaintiffs called attention to the fact that there had been no express repeal of the ordinance adopted in March, 1957, to "reaffirm, reenact and continue in full force and effect" one of the original ordinances [2 Race Rel. L. Rep. 457 (1957)]. However, the court held that the March, 1957, ordinance by clear implication has been repealed also. The action was dismissed as moot, without prejudice to plaintiffs' rights to reassert in appropriate proceedings the matters contained in their supplemental complaint. Costs were taxed against defendants.

GROOMS, Judge:

ORDER DISMISSING ACTION

This matter, being regularly set, came on for hearing on this date. On October 28, 1958, plaintiffs filed in this cause a purported amendment challenging the constitutionality of Ordinance 1487-F, adopted October 14, 1958.[1] At the hearing plaintiffs moved for leave to file this purported amendment as a supplemental complaint. The defendants and each of them objected to the allowance of the supplemental complaint. The allowance of a supplemental pleading is a matter of discretion.

The complaint herein, as amended, is one primarily for declaratory relief, with injunctive relief incidental thereto. The main issue is one of law as to whether Sections 1002 and 1413 of the General City Code of Birmingham are unconstitutional on their face. A test of Ordinance 1487-F will primarily and of necessity present factual issues—the unconstitutional application of the ordinance. The Court is of the opinion that the plaintiffs' motion for leave to file the supplemental complaint, Exhibit A, should be disallowed.

[*Motion to Dismiss*]

The defendants have moved to dismiss the complaint, as previously amended, on the ground that the action is moot in view of the adoption of Ordinance 1486-F [2] which repealed said Sections 1002 and 1413. Plaintiffs in reply, among other things, point to Ordinance 1342-F, adopted March 12, 1957, and entitled "An Ordinance to reaffirm, reenact and continue in full force and effect Section 1413 of the General Code of the City of Birmingham." When Sections 1002 and 1413 of the General Code were repealed, Ordinance 1342-F was not expressly repealed. It appears to be a post-factum legislative declaration attempting to justify the enactment and the continuation of Section 1413.

1. "ORDINANCE NO. 1487-F
"AN ORDINANCE RELATING TO CARRIERS OF PASSENGERS FOR HIRE.
"BE IT ORDAINED by the Commission of the City of Birmingham as follows:
"Section 1. That carriers of passengers for hire operating in the City of Birmingham are authorized to formulate and promulgate such rules and regulations for the seating of passengers on public conveyances in their charge as are reasonably necessary to assure the speedy, orderly, convenient, safe and peaceful handling of passengers.
"Section 2. A willful refusal to obey a reasonable request of an operator or driver of such a public conveyance in relation to the seating of passengers thereon shall constitute a breach of the peace."

2. Adopted on the same date as 1487-F.

It is not, *ex proprio vigore,* a segregation ordinance enforceable apart from Section 1413 and can not stand in view of the express repeal of the latter section. The ordinance which it purported to "reaffirm, reenact and continue" having been repealed, Ordinance 1342-F, though not expressly, was by clear implication repealed by Ordinance 1486-F.

[*Action Moot*]

The Court is of the further opinion that this action challenging as unconstitutional Sections 1002 and 1413 of the General Code of the City of Birmingham is moot in view of the repeal of those sections.

Since the infirmity inherent in Sections 1002 and 1413 (Browder v. Gayle, 142 F.Supp. 707, 352 U.S. 903) at the time of their repeal, was inherent when this action was filed, and due to the further fact that the repeal came only after a number of hearings herein, costs will be taxed against the defendants.

It is, therefore, ORDERED, ADJUDGED and DECREED:

1. That plaintiffs' motion for leave to file a supplemental complaint, designated "Exhibit A" to their motion, be and the same is hereby overruled, without prejudice, however, to the rights of the plaintiffs to reassert the matters set out in the purported supplemental complaint in an appropriate proceeding.

2. That this action be and the same is hereby dismissed as moot.

3. That costs herein be taxed against the defendants.

Done and Ordered, this the 30th day of October, 1958.

TRIAL PROCEDURE
Evidence—Alabama

James THOMPSON v. STATE

Court of Appeals of Alabama, August 19, 1958, 105 So.2d 146.

SUMMARY: In a murder trial in an Alabama state court, the prosecutor asked one of defendant's seven character witnesses if he would stand by his testimony that defendant was a man of good reputation if he knew "he spent his time in the neighborhood and consorted with colored people." The court granted a motion to exclude that type question. No mistrial was requested nor was the question made ground for a new trial, but defendant urged it, among other points, as error on appeal. The Court of Appeals of Alabama affirmed the conviction of first degree manslaughter. While regarding the question as improper, the court considered it harmless since unanswered.

CATES, Judge.

Thompson was indicted for murder in the first degree for killing Jack Strong with a shotgun. The jury found him guilty of manslaughter in the first degree and fixed his punishment at eight years' imprisonment in the penitentiary.

* * *

Appellant called seven character witnesses and rested.

The prosecutor asked one of the character witnesses, "If you know he spent his time in the neighborhood and visited and consorted with colored people would you still say he was a man of good reputation?" Appellant's counsel moved "that type question be excluded." The court granted the motion. Aside from the racial aspect, the question was not apt under the rule of Mullins v. State, 31 Ala.App. 571, 19 So.2d 845, as being based on a course of behavior rather than the impact of it on the community.

Ordinarily, improper questions not answered are harmless. Haney v. State, 20 Ala.App. 236, 101 So. 533; Moore v. State, 16 Ala.App. 503, 79

So. 201. No mistrial was requested nor was this question made a ground for new trial.

• • •

After a complete review of the record and consideration of all the points urged as error by appellant, it appears that there was no reversible error in the trial below, and that the judgment should be

Affirmed.

LEGISLATURES

EDUCATION
Public Schools—Virginia (Norfolk)

The City Council of Norfolk, Virginia, on October 21, 1958, adopted a resolution calling for a referendum on whether city voters wished the governor petitioned to return closed schools to the control of the city, for reopening on an integrated basis. The resolution appears below. [The referendum was held on November 18, 1958, and press reports indicate a vote in a 3-2 ratio against reopening the schools on the basis stated. For a summary of previous events affecting Norfolk schools, see 3 Race Rel. L. Rep. 942-964 (1958)].

A RESOLUTION REQUESTING THE NORFOLK ELECTORAL BOARD TO HOLD AN ADVISORY REFERENDUM OF THE QUALIFIED VOTERS AS OF OCTOBER 4, 1958, TO ASCERTAIN THEIR WILL ON A CERTAIN QUESTION CONCERNING THE PUBLIC SCHOOLS.

WHEREAS, it is necessary for the immediate preservation of the public peace, property, health and safety that the provisions of this resolution be immediately adopted, an emergency is set forth and declared to exist, pursuant to Section 15 of the Norfolk Charter of 1918; now, therefore,

BE IT RESOLVED by the Council of the City of Norfolk:

Section 1. That the Norfolk Electoral Board be, and the same hereby is, requested to hold, on November 18, 1958, an advisory referendum of the qualified voters as of October 4, 1958, of the City of Norfolk, to ascertain their will on the following question:

SHALL THE COUNCIL OF THE CITY OF NORFOLK, PURSUANT TO STATE LAW, PETITION THE GOVERNOR TO RETURN TO THE CITY CONTROL OF SCHOOLS, NOW CLOSED, TO BE OPENED BY THE CITY ON AN INTEGRATED BASIS AS REQUIRED BY THE FEDERAL COURT?

☐ *FOR* PETITIONING THE GOVERNOR.
☐ *AGAINST* PETITIONING THE GOVERNOR.

Section 2. The Norfolk Electoral Board be, and the same hereby is, requested to include on the ballot the following information in the following form:

FOR INFORMATION ONLY.
NOT TO BE VOTED ON.

IN THE EVENT THE CLOSED SCHOOLS ARE RETURNED TO THE CITY OF NORFOLK, AND ARE RE-OPENED INTEGRATED BY THE CITY, IT WILL BE NECESSARY, BECAUSE OF THE LOSS OF STATE FUNDS, FOR EVERY FAMILY HAVING A CHILD OR CHILDREN IN PUBLIC SCHOOLS FROM WHICH STATE FUNDS ARE WITHHELD, TO PAY TO THE CITY A SUBSTANTIAL TUITION FOR EACH CHILD IN OR ENTERING SUCH PUBLIC SCHOOL.

Section 3. That the City Clerk is directed to transmit a certified copy of this resolution to the Chairman of the Norfolk Electoral Board.

Section 4. That this resolution, being an emergency resolution, shall be in effect from and after its adoption.

Adopted by the Council October 21, 1958.

ADMINISTRATIVE AGENCIES

EDUCATION
Tuition Grants—Virginia

Regulations governing tuition grants in accordance with provisions of the Appropriation Act of 1958, adopted by the Virginia State Board of Education, effective September 1, 1958, are reproduced below. [See also, Act of the 1956 Extra Session of the Virginia General Assembly originally providing for tuition grants, 1 Race Rel. L. Rep. 1094 (1956)].

REGULATIONS GOVERNING
TUITION GRANTS

In accordance with provisions of the Appropriation Act (1958), Sections 22-115.10 through 22-115.19 and Sections 22-188.3 through 22-188.15 of the Code of Virginia, the following regulations are hereby adopted effective September 1, 1958.

These regulations are applicable to all public schools in Virginia in counties, cities, towns operating as separate school districts, and jointly owned and operated schools which are administered by a Committee of Control.

Availability of Tuition Grants

Tuition grants will be available for pupils under the following conditions:

(1) When all schools in a county, city or town are closed and not reopened by operation of law or by order of the Governor.

(2) When one or more schools or parts thereof in a county, city or town are closed and not reopened by operation of law or by order of the governor.

(3) When a child or children are assigned to or are in attendance at public schools wherein both white and colored children are enrolled and the parents of such child or children object to the assignment of such child or children and/or attendance at any school wherein both white and colored children are enrolled.

(4) Upon the direction of the Governor in the discharge of the responsibilities imposed upon him by law.

Amount of Tuition Grants

The total amount of each grant shall be the amount necessary to be expended by the parent, guardian or other person having custody of such child, in payment of the cost of his attendance at a non-sectarian private school for the current school year; provided, however, that such annual grant shall not exceed the total cost of operation per pupil in average daily attendance in the public schools for the locality making such grant as determined for the preceding school year by the Superintendent of Public Instruction.

Payment of Tuition Grants by Local School Board

All tuition grant payments will be made by local school boards. These may be paid in not less than three equal installments on the basis of the submission of a properly executed form, which form is described elsewhere in these regulations.

The first installment shall be payable on the submission of satisfactory evidence of enrollment in a private non-sectarian school; the second to be payable at the end of the fourth month of the school term for which the tuition grant has been approved; and the third installment to be payable thirty days before the end of the school term for which such grant has been approved. Proration of payments may be made for less than a full term.

However, such parent or guardian may not compel a local school board to provide such tuition payments until the Governor, State

Board of Education and/or local school board has complied with the provisions of the Code of Virginia in all matters relating to the closing of schools under the emergency powers of the Governor, his efforts to reopen same, and until the Governor or local school board has had sufficient time to exhaust all efforts to reassign pupils to public schools within the division or to a school in another division under a tuition plan or agreement between the respective Boards of Education. However, nothing in these regulations or those adopted by a local school board shall be construed as authority, direct or indirect, to deny payment of such tuition grant as provided by law.

On the basis of an approved application, the school board shall authorize the issuance of school board warrants or checks drawn on the county or city treasurer for the amount of the approved application for tuition-grant aid at such times as are stated above. The checks so issued shall be made payable to the parent or guardian and delivered to such parent or guardian after the presentation of an official notice of enrollment of the child or children in a school approved in accordance with the provisions of the following section. The words "For Tuition Grant in_____School" shall be plainly written on each check so issued.

Eligibility of Tuition Grant Recipients

Tuition grants, when paid from State and local funds, may be paid to the parent or guardian for the attendance of a child or children in a private non-sectarian school approved by the State Board of Education. For such approval, a school shall meet the following minimum requirements:

(1) The teacher or teachers can establish eligibility under the State Board of Education's certification regulations, including provisions for Special License.
(2) The facilities meet State requirements for health and safety.
(3) Enrollment shall not be less than 20 pupils.
(4) The duration of the school term shall not be less than 180 teaching days.
(5) The length of school day shall not be less than five hours.
(6) (a) The elementary school curriculum shall include the following subjects as a minimum:
Spelling, reading, writing, arithmetic, English, geography, health, drawing, civics, history of Virginia, and history of the United States.
(b) The high school curriculum shall include the following subjects as a minimum:
English (4 years), math (1 year), history and government (2 years), and science (1 year).
Additional elective credits must be offered in order to total 16 units for graduation.

Exceptions to these minimum requirements may be considered.

Applications for Tuition Grants

Each applicant requesting a tuition grant shall execute an affidavit which shall include, but not be limited to, the following information:

(1) Name of child.
(2) Name and address of parent or guardian.
(3) Name of school last attended and grade.
(4) Name of school in which child for whom application for tuition grant is made has been accepted.
Address of school.
Name of principal, headmaster, or other administrative head.
Grade to which applicant has been assigned.
Number of actual teaching days such private school is scheduled for operation.
(5) The parent or guardian of such child or children agrees to furnish the Division Superintendent of Schools such information as he may require concerning the average daily attendance of such child or children receiving tuition grant aid.
(6) The parent or guardian agrees to refund such tuition grants if the pupil fails to attend school regularly.
(7) If tuition grants are sought, obtained, and/or expended for any purpose other than those set forth in the statutes, regulations of the State Board of Education and/or regulations adopted by the local school board, then such parent or guardian shall be punishable as provided by Section 18-237 of the Code of Virginia.
(8) The parent or guardian shall certify that the grant is requested for the sole purpose of paying tuition at a private non-sectar-

ian school, and/or for transportation costs. If tuition grant aid is requested for a child who has been withdrawn by the parent or guardian from a public school in which both white and colored children are being taught, then such parent or guardian shall also certify that he objects to sending such pupil to a school in which both white and colored children are being taught.

(9) Such affidavit shall be signed by the parent or guardian of the child and certified by a notary public or other officer authorized to acknowledge such documents. The notarial or other official seal is required.

Reimbursement to Local School Boards

The State Board of Education will reimburse local school boards for the State's share of such tuition payments as prescribed by statutes. Reimbursement by the State shall be requested on form prescribed by the Superintendent of Public Instruction.

Application For Tuition Grant

1. Name of child _____
2. Name of parent or guardian _____
   Address _____ Phone _____
3. Name of school last attended _____
   Grade _____
4. Name of school in which applicant for tuition grant has been accepted _____
   Address _____
   Name of principal, headmaster, or other administrative head _____
   Grade to which applicant has been assigned _____
   Number of actual teaching days such private school is scheduled for operation _____
   Amount of tuition fees paid and/or payable $ _____
5. If tuition funds are made available, I agree
   (1) To furnish the Division Superintendent of Schools with such information as he may request and/or require concerning the attendance of this child for whom tuition is requested.
   (2) To refund such tuition grant if the pupil fails to attend regularly.
6. I hereby certify that the grant is requested for the sole purpose of paying tuition at a private non-sectarian school, and/or for transportation costs.
7. I (we) have read the above questions and answers, and I (we) understand that if tuition grants are sought, obtained, and/or expended for any purpose other than those set forth in the statutes, regulations of the State Board of Education and/or regulations adopted by the local school board, I (we) shall be punishable as provided by Section 18-237 of the Code of Virginia.
8. I hereby apply for a tuition grant in the amount of $ _____ for the _____ school year and for the purpose stated above.

_____ _____
Date Parent or Guardian

(If this application represents a request for tuition grant aid for children withdrawn by the parent or guardian from a public school in which both white and colored children are being taught, the following certificate must be executed.)

I (we) certify that I (we) object to sending my (our) child to a school in which both white and colored children are being taught.

_____ _____
Date Parent or Guardian

THE FOLLOWING CERTIFICATE MUST BE EXECUTED BY A NOTARY PUBLIC OR OTHER PERSON AUTHORIZED TO TAKE ACKNOWLEDGEMENTS

State of Virginia
County (City) of _____
On this _____ day of _____, 19____

_____
(Name of person executing this form)

whose name is signed to the foregoing instrument (s), personally appeared before me, acknowledged the foregoing signature to be his, and, having been duly sworn by me, made oath that the statements made in the said instrument (s) are true.

My commission expires _____ _____
Notary Public

The above application is recommended for approval.

_____ _____
Date Division Superintendent

The above application is hereby approved in the amount of $ _____
based on _____
_____ County (City) School Board

_____

EMPLOYMENT
Fair Employment Laws—Minnesota

Charles L. WILLIAMS v. MURPHY MOTOR FREIGHT LINES, Inc.

Fair Employment Practice Commission, St. Paul, Minnesota, November 18, 1958.

SUMMARY: A Negro filed a complaint with the St. Paul, Minnesota, Fair Employment Practice Commission against a motor freight company alleging a discriminatory refusal to hire. The Commission found discrimination as alleged and recommended that the company hire the complainant if he presents himself for work within the succeeding four months. The Commission also recommended that the case be referred to municipal counsel for prosecution of the company in the event of its continuing refusal to hire.

BACKGROUND

Under provision of Section 7(g) and Section 9(a) of the Ordinance on Fair Employment Practices (hereinafter referred to as Ordinance), the Commission received a written complaint dated November 12, 1957, by Charles L. Williams (hereinafter referred to as complainant), a Negro, of the then given address of 643 Iglehart Avenue, St. Paul, Minnesota, alleging that an unfair practice of discrimination occurred when he was not hired as the result of an application he submitted for a job as freight handler on or about August 27, 1957, with Murphy Motor Freight Lines, Inc., (hereinafter referred to as respondent) of 965 Eustis Street, St. Paul, Minnesota. In accord with Section 7(g) and Section 9 of the Ordinance, the Commission conducted an investigation on the complaint, subsequently determined that there was probable cause to credit the allegations of the charge, and attempted to equitably settle and adjust the matter by conciliation.

On September 23, 1958, the Commission conducted a public hearing on this matter, in accord with Section 9 of the Ordinance, at approximately 2:30 p.m. in the County Board Room of the City Hall and Court House, pursuant to notice given to respondent, Murphy Motor Freight Lines, Inc., for the purpose of a public hearing on the complaint submitted to respondent along with the said notice of hearing. Commission members present were: Herbert G.

Heneman, Jr., chairman; Walter E. Nelson, and Henry S. Giannini.

The chairman stated a brief history of the circumstances pertaining to the complaint. The complainant was then offered the opportunity to testify; however, he failed to appear. The Commission's executive secretary, Daniel Jacobowski, then testified on his report of investigation that he had made. Respondent was next offered opportunity to testify and was represented by Harold Schultz and Richard S. Felhaber. The respondent also offered as witnesses on its behalf the testimony of Carl Brostrum, respondent's personnel man, and G. H. Becker, respondent's vice president in charge of operations. The opportunity of cross examination of persons testifying was extended to all parties concerned, and questions of all parties concerned were freely allowed. The public hearing concluded after all evidence was heard and all cross-examination and questions were finished. As a result of the testimony furnished at the public hearing and of the evidence before it, the Commission now finds that:

FINDINGS OF FACT

1) On or about August 27, 1957, the complainant did personally appear at the respondent firm and submitted a written application with the respondent for a job as freight handler. In connection with this application and visit, the complainant was interviewed by Carl Brostrum, the respondent's personnel man.

2) At this time, prior to it, and for several weeks thereafter, respondent firm was in a hiring period during which time freight handlers were being hired and employed. The hiring period was in continuation during the months of late summer and early autumn, 1957.

3) In connection with this original application of the complainant, the respondent found nothing unsatisfactory about his background or ability to perform the job in question insofar as the respondent's job requirements were concerned. Likewise, the respondent raised no questions or comments to the complainant relative to anything unsatisfactory about his application, and took no measures, either in his presence or immediately thereafter, relative to clarifying or resolving any questions which might have arisen in connection with his application. In all respects, there appeared to be no question about his qualifications and ability to perform the work.

4) At no time during the hiring period referred to did the respondent give any consideration to the hiring of the complainant, nor did the respondent process the complainant's application through the normal screening and selection procedure which was part of the respondent's hiring process. The respondent took no action beyond the receipt of the complainant's application and the interview of him.

5) The respondent's personnel man, Mr. Brostrum, stated that he did not specifically recall the complainant nor the incident of his application. The reason offered by the respondent for not having hired the complainant and for not having considered him for employment is that all of his work history was out of town at the distant point of Kansas City, Missouri, and that respondent has a general policy of not hiring applicants with no local references or work history.

6) However, the respondent on occasion has made out-of-town reference checks regarding applicants. The respondent's policy, relative to the checking of references of applicants, is confusing and inconsistent, and it has not been established as a fact that the respondent conducts a reference check on all applicants before they are hired, and it is a fact that the file records on many of the respondent's employees show no record or verification that reference checks were ever made.

7) On January 21, 1958, the Commission unanimously found probable cause for crediting the allegations of the charge of discrimination, and subsequently entered into conciliation with the respondent.

8) On March 18, 1958, the Commission entered into a conciliation agreement with the respondent, by the terms of which the respondent agreed to offer to the complainant consideration for the first job opening which the respondent might have after its current employees on layoff were recalled and pending satisfactory completion of the checking of complainant's personal and work references and a physical exam; the reference checking to be done by the respondent during the interim. Thereupon, pursuant to the agreement, the complainant was to be among the first group of applicants to be next considered for the line supervisor's determination for em-

ployment. The respondent breached the conciliation agreement in that on or about May 2, 1958, when the complainant again revisited the respondent, after being notified that the respondent now had a job opening, the respondent did introduce and employ a new and additional screening factor, that of a weighted application form, which was not in use by the respondent during the 1957 hiring period above referred to and which was not contemplated in the conciliation agreement entered into by the Commission and the respondent in March of 1958; and that purportedly, as a result of said new screening technique, the respondent failed to qualify the complainant for consideration and failed to include him among the first group of applicants to be considered for hire by the line supervisor.

9) The Commission finds that the respondent has violated its own hiring rules and has not afforded to the complainant the customary and normal treatment by which applications are usually processed, and the Commission finds that this denial was made by the respondent because of the complainant's color.

10) Based upon the foregoing Findings of Fact and in accord with the authority conferred by Section 9(c) of the Ordinance, the Commission has unanimously determined that the respondent has engaged in an unfair practice in violation of Section 5(a) of the Ordinance.

RECOMMENDATION

Upon the foregoing Findings of Fact the Commission, in accord with Section 9(c) of the Ordinance, issues the following Recommendation: In the event that the complainant shall present himself to the respondent for employment within a period of four months from the mailing of these Findings and Recommendation to the respective parties, that then the respondent so hire and employ the complainant; and that in the event the complainant so presents himself and the respondent refuses to hire him, that this case and matter then be certified to the Corporation Counsel for prosecution without further action by the Commission.

CITY OF ST. PAUL
FAIR EMPLOYMENT
PRACTICES COMMISSION

By Daniel G. Jacobowski
Executive Secretary

EXPENDITURES
National Guard—Arkansas

In connection with desegregation developments at Central High School in Little Rock, Arkansas, in September 1957, the Arkansas National Guard was federalized pursuant to an order of the President of the United States. 2 Race Rel. L. Rep. 964 (1957). Senator John Stennis of Mississippi in a May 26, 1958 letter to the Comptroller General of the United States requested a determination as to "whether, in this instance, a legal disbursement was made of funds appropriated for national defense." In his reply, the Comptroller General concluded that the procedural steps involved were proper and that the consequent expenditures were legal. The reply, dated August 1, 1958, is reprinted below.

B-136316

August 1, 1958

Honorable John Stennis
United States Senate

Dear Senator Stennis:

Your letter of May 26, 1958, acknowledged June 2, advises us that in your opinion the federalization of the Arkansas National Guard pursuant to Executive Order 10730 did not comply with the procedural requirements of law for such use of the Army National Guard under 10 U. S. C. 3500, and requests our determination as to "whether, in this instance, a legal disbursement was made of funds appropriated for national defense."

Our Office, of course, cannot pass judgment upon the question of whether the situation in Little Rock was such as to warrant the invoking by the President of his authority under the laws of the United States to federalize the National Guard. Hence, our decision concerning the legality of the expenditure of appropriated funds in connection with such federalization must revolve entirely around the procedural aspect.

Section 3500 of Title 10 of the United States Code, referred to in your letter, provides as follows:

"Whenever—

(1) the United States, or any of the Territories, Commonwealths, or possessions, is invaded or is in danger of invasion by a foreign nation;

(2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or

(3) the President is unable with the regular forces to execute the laws of the United States; the President may call into Federal service members and units of the Army National Guard of any State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States, the Territories, Puerto Rico, and the Canal Zone, and, in the District of Columbia, through the commanding general of the National Guard of the District of Columbia."

The President did not invoke the authority granted by the above-quoted law. The Arkansas National Guard was federalized pursuant to Executive Order 10730 dated September 24, 1957. That Order reads, as follows:

"Providing assistance for the removal of an obstruction of justice within the State of Arkansas

Whereas on September 23, 1957, I issued Proclamation No. 3204 reading in part as follows:

"'*Whereas* certain persons in the State of Arkansas, individually and in unlawful assemblages, combinations, and conspiracies, have wilfully obstructed the enforcement of orders of the United States District Court for the Eastern District of Arkansas with respect to matters relating to enrollment and attendance at public schools, particularly at Central High School, located in Little Rock School District, Little Rock, Arkansas; and

"'*Whereas* such wilful obstruction of justice hinders the execution of the laws of that State and of the United States, and makes it impracticable to enforce such laws by the ordinary course of judicial proceedings; and

"'*Whereas* such obstruction of justice constitutes a denial of the equal protection of the laws secured by the Constitution of the United States and impedes the course of justice under those laws:

"'*Now, Therefore, I, Dwight D. Eisenhower*, President of the United States, under and by virtue of the authority vested in me by the Constitution and Statutes of the United States, including Chapter 15 of Title 10 of the United States Code, particularly sections 332, 333 and 334 thereof, do command all persons engaged in such obstruction of justice to cease and desist therefrom, and to disperse forthwith;' and

"*Whereas* the command contained in that Proclamation has not been obeyed and wilful obstruction of enforcement of said court orders still exists and threatens to continue:

"*Now, Therefore*, by virtue of the authority vested in me by the Constitution and Statutes of the United States, including Chapter 15 of Title 10, particularly sections 332, 333 and 334 thereof, and section 301 of Title 3 of the United States Code, it is hereby ordered as follows:

"Section 1. I hereby authorize and direct the Secretary of Defense to order into the active military service of the United States as he may deem appropriate to carry out the purposes of this Order, any or all of the units of the National Guard of the United States and of the Air National Guard of the United States within the State of Arkansas to serve in the active military service of the United States for an indefinite

period and until relieved by appropriate orders.

"**Sec. 2.** The Secretary of Defense is authorized and directed to take all appropriate steps to enforce any orders of the United States District Court for the Eastern District of Arkansas for the removal of obstruction of justice in the State of Arkansas with respect to matters relating to enrollment and attendance at public schools in the Little Rock School District, Little Rock, Arkansas. In carrying out the provisions of this section, the Secretary of Defense is authorized to use the units, and members thereof ordered into the active military service of the United States pursuant to Section 1 of this Order.

"**Sec. 3.** In furtherance of the enforcement of the aforementioned orders of the United States District Court for the Eastern District of Arkansas, the Secretary of Defense is authorized to use such of the armed forces of the United States as he may deem necessary.

"**Sec. 4.** The Secretary of Defense is authorized to delegate to the Secretary of the Army or the Secretary of the Air Force, or both, any of the authority conferred upon him by this Order.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
September 24, 1957."

Sections 332, 333, and 334 of Title 10 of the United States Code, which were specifically cited by the President as the authority for his actions, provide as follows:

"§332. *Use of militia and armed forces to enforce Federal authority*

"Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any state, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

"§333. *Interference with State and Federal law*

"The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

"(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

"(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution."

"§334. *Proclamation to disperse*

"Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time."

While the quoted sections refer to the "Militia" rather than to the "National Guard" section 311 of Title 10, United States Code, provides that the organized militia consists of the National Guard and the Naval Militia. Section 301 of Title 3, United States Code, also cited by the President, authorizes him to—

"* * * designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action

by the President (1) any function which is vested in the President by law, * * *."

We view these sections as authorizing the President to call the National Guard into Federal service whenever, *in his judgment*, the circumstances set out therein exist and to designate an official who is required to be appointed by and with the advice and consent of the Senate, to perform that function. No procedural steps for calling up the Guard are specified therein other than the requirement of 10 U. S. C. 334 that a proclamation to disperse and retire peaceably be issued. That requirement appears to us to have been satisfied by Presidential Proclamation 3204, dated September 23, 1957, which is quoted in the Executive Order. Hence, the issuance of the Executive Order directing the Secretary of Defense to order into the active military service of the United States such units of the Arkansas National Guard as he deemed appropriate to carry out the purposes of the Order appears to be a proper and logical means of exercising the authority granted to the President by the cited sections of law. The subsequent order released the same day, whereby the Secretary of Defense instructed the Secretary of the Army to call into Federal service all of the Army and Air National Guard organizations of the State of Arkansas, likewise does not appear to be procedurally improper.

In light of the foregoing statutes and comments, we do not believe that the procedural steps followed in federalizing the Arkansas National Guard were improper; hence, in our opinion, expenditures of appropriated funds resulting from such federalization are legal, if otherwise properly incurred. In that connection, we attach hereto for your information copies of our decisions B-133972 of October 17, 1957, and B-135120 of April 3, 1958, regarding certain specific payments involved in the federalization of the Arkansas National Guard.

Sincerely yours,

JOSEPH CAMPBELL
Comptroller General
of the United States

Enclosures

PUBLIC ACCOMMODATIONS
Student Rooming Houses—Colorado

In answer to inquiries by the Assistant Dean of Men of the University of Colorado, the Director of the Colorado Anti-Discrimination Commission has expressed opinions that (1) student rooming and boarding houses, whether operated by the state university or by private enterprise, are places of public accommodation under terms of the Colorado Civil Rights Anti-Discrimination Act; and that (2) the state university might be cited for violation of the Act if it should list, or refer students to, such houses which practice racial discrimination.

THE STATE OF COLORADO
ANTI-DISCRIMINATION COMMISSION
Suite 910 – 655 Broadway
Denver 3, Colorado

July 29, 1958

Mr. George Lesser
Assistant Dean of Men
Woodbury Hall
University of Colorado
Boulder, Colorado

Dear George:

In our brief conversation of last Friday, you raised two interesting questions: (1) Are student rooming and boarding houses places of public accommodation within the meaning of the Colorado Civil Rights Anti-Discrimination Act? And (2) Does the same law prohibit the university from the listing of, and the referring of students to, student rooming and boarding houses which refuse accommodations to students because of race, creed, color, national origin or ancestry?

The said law (Ch. 25, CRS 1953 as amended Ch. 96, CSL 1957) defines places of public accommodation in both Article 1–(1) and Article 2–(3). In both definitions, certain kinds of

establishments are enumerated, and also both definitions contain "catch-all" phrases extending the coverage beyond the enumerate kinds of establishments. Article 1–(1) says "and all other places of public accommodation . . . ;" and Article 2–(3) says, "shall be deemed to include . . . ." In two separate actions, the Commission held that convalescent homes and dance studios are places of public accommodation. The Commission's findings were based upon the belief that those two kinds of establishments were covered by the "catch-all" phrase, "and all other places of public accommodation . . . ." My opinion is that student rooming and boarding houses are places of public accommodation whether operated by the university itself or by private enterprisers; and, therefore, as such are prohibited from withholding their accommodations from students because of race, creed, color, national origin or ancestry.

With respect to question (2), the Commission's authority to say that the university shall not list, nor refer students to, rooming and boarding houses which practice discrimination, is not clearly set forth in the law. It might be argued, however, that the university becomes the agent of rooming and boarding houses when it lists such establishments for referral of students thereto; and as agent, the university would be subject to the same regulations as its principal. If it should be found that the university is referring students to establishments which discriminate, it might be cited for violation of the law under Article 1–(2) which reads in part as follows: "Any person who shall violate any of the provisions of section (1) . . . , or by aiding or inciting such denial, ..." However, the establishment of either the validity or the invalidity of these arguments at this time is unimportant because, as you stated in our conversation, the university is complying with the spirit of the law by refusing to list, and refer students to, rooming and boarding houses which are known to discriminate.

To strengthen the position of the university administration, and to clear up misunderstandings and suspicions which have already arisen, and which are likely to crop up from time to time, I recommend that the university administration adopt and publish a statement of policy similar to the one adopted by the University of Washington. It reads as follows:

> "If it should come to the attention of the University that a property listed at the Office of Student Residences is not equally available to all students regardless of race, creed or color, or if a complaint is made that a property owner has shown racial or other discrimination in the selection of student occupants, the matter will be referred for investigation to the Washington State Board Against Discrimination. If the State Board finds that discriminatory practices have been in effect, the services of the Office of Student Residences will be denied the property owner, and the listing of the property withdrawn, until there is proper showing that such practices have been ended."

When you act upon this matter, will you please send a copy of your policy statement to me.

Very truly yours,
Roy M. Chapman, Director

ATTORNEYS GENERAL

EDUCATION
Public School Funds—Arkansas

In answer to a request by the state Commissioner of Education, the Arkansas Attorney General has issued an opinion covering several aspects of a recent Act [3 Race Rel. L. Rep. 1043 (1958)] which deals with the withholding and distribution of state funds when schools are closed. The opinion follows.

October 24, 1958

Honorable A. W. Ford
Commissioner of Education
Education Building
Little Rock, Arkansas

Dear Mr. Ford:

I have your recent letter which reads as follows:

> The State Board of Education desires to have a legal opinion from your office relative to some of the provisions included in Act 5 of the 1957 Second Extraordinary Session of the General Assembly of the State of Arkansas. The State Board of Education will appreciate it very much if you will give a legal opinion at the very earliest time in order that the State Board of Education may proceed to fully comply with the Arkansas Statutes.
>
> 1. Is it mandatory that the State Board of Education through its authorized agent withhold a certain amount of state financial assistance from the Little Rock School District?
>
> 2. Is the State Board of Education required to allocate to accredited public school districts and/or accredited private schools located within the boundaries of the State of Arkansas a pro rata share of the revenue withheld from the Little Rock School District for the education of pupils who have transferred from the Little Rock District to other public or private accredited schools?
>
> 3. Is either the withholding of some State Aid from the Little Rock School District or the allocation of some or all of this amount to other school districts or private accredited schools in violation of the restraining order issued by the Court? (Copy of restraining order is attached.)
>
> 4. What legal disposition can be made of any State Aid withheld from the Little Rock School District that is not required to be sent to any other accredited school for the education of Little Rock students?
>
> 5. Is the State Board of Education employing the proper procedures in order to fully satisfy the provisions of Act 5 of the 1957 Second Extraordinary Session of the General Assembly of the State of Arkansas?
>
> As a matter of clarification for Question 5, I wish to submit the following information: The State Board of Education has authorized the allocation of some of the revenue withheld from the Little Rock School District to the public and private accredited schools within the boundaries of the State of Arkansas where the former pupils of the Little Rock High Schools are now in attendance. You will note that Vocational Aid and Aid for Handicapped Children is on a reimbursible basis and cannot be determined to the exact dollar until later in the fiscal year.
>
> It appears that $172.66 can be paid per pupil enrolled from the amount withheld from the Little Rock District so long as there is not more than 2,995 pupils involved. If 3,000

or more children should be involved, then the amount to be paid for each pupil would be reduced proportionately. Any adjustment in the amount to be paid monthly could be made in the last one or two monthly allocations of aid to the schools that are educating the transfer pupils from the Little Rock School District.

Section 2 and 3 of Act 5 of the 1957 Second Extraordinary Session of the Sixty-First General Assembly of the State of Arkansas provide:

> **Section 2.** Whenever the Governor shall order any school to be closed, and continuing thereafter until such order shall have been countermanded by the Governor, the State Board of Education, acting through its Commissioner of Education, *shall* cause to be withheld from the State funds otherwise allocable to the school district having jurisdiction over any such school, an amount equal to the proportion of the total of such State funds that the total average daily attendance of students for the next preceding school year in the closed school bears to the total average daily attendance of all students of the district for said next preceding school year; plus, and also from State funds, an amount equal to the same foregoing proportion of ad valorem taxes collected in the calendar year next preceding the date of any such closing order for the benefit of the said school district for maintenance and operation; plus, and also from State funds, to amount equal to the same foregoing proportion of all funds allocable to the school district during the then current fiscal year from the County General School Fund, all as set forth in the budget of the County Board of Education.
>
> **Section 3.** Should any of the students of any school so closed by order of the Governor determine to attend, and attend, in this State, any other public school, or any non-profit private school accredited by the State Board of Education, then State funds so withheld as hereinbefore provided, *shall* be paid over by the State Board of Education to each said other public school or accredited non-profit private school in an amount equal to the same proportion of the total said State funds that the number of transferred students in any such public or private school bears to the total number of students upon which said withholding was made as hereinbefore provided. Appropriations of funds contained in Act 305, approved March 27, 1957, shall be usable for the purposes herein provided. (*Emphasis supplied.*)

1. From a reading of § 2 above, it is readily apparent that the Legislature in using the word "shall" intended that it be mandatory that the State Department of Education withhold certain State financial assistance, the amount thereof to be determined by formula contained in said section, from any school district closed by executive order of the Governor under the provisions of Act 4 of the 1957 Second Extraordinary Session of the General Assembly.

2. In regard to Question 2, I again call your attention to the use of the word "shall". This section merely gives recourse to any pupil in a school closed down to attend some other public school or other non-profit, private school, accredited by the State Department of Education, and provides that such accredited non-profit school shall be compensated for the education furnished in an amount equal, on a proportional basis that such transferred students bear to the number of students upon which said withholding was made.

3. This question pertains to the restraining order issued by the Circuit Court of Appeals on September 29, 1958. The language of that restraining order is directed primarily to the Little Rock School Board's transfer of the four high schools of the Little Rock District to a private corporation, and directs that no one shall interfere with the integrated status or the status quo existing as of September 25, 1958. It should be remembered that the four subject schools were closed by executive order as of 8:00 A.M., September 15, 1958, and that nothing in Act 5, or thereunder, are designed or capable of re-opening schools closed by executive order. Consequently, I am of the opinion that the withholding of State aid, or the allocation thereof to other public schools or non-profit, private accredited schools is not violative of the restraining order of the Circuit Court of Appeals.

4. Act 5 is not definite as to the disposition of money withheld from a school district that is not required to be sent to other accredited schools for the education of pupils that have enrolled in those other accredited schools. The withheld

funds should remain in suspense until the Legislature by appropriate law directs its disposition.

5. I have checked the mimeographed sheet you enclosed with your letter which you label "Procedures to use in order to comply with requirements of Act 5 of the Second Extraordinary Session of the 1957 General Assembly." This is basically a fact question, bottomed on figures not at my disposal. However, assuming the statistics you included on this sheet are correct, it is the opinion of this office that these procedures are in compliance, as far as I am able to determine, with Act 5.

Yours very truly,

BRUCE BENNETT
Attorney General

BB:mtl

EDUCATION
School Buses—Connecticut

In response to a request from the office of the state Commissioner of Education the Attorney General of Connecticut has issued an opinion that the state reimbursement program for monies spent by towns in transporting school children is not applicable to the transportation furnished children in non-public schools. A 1957 statute had authorized towns under certain conditions to extend school transportation facilities to children attending non-profit private schools.

STATE OF CONNECTICUT
ATTORNEY GENERAL'S OFFICE

August 21, 1958

Honorable William J. Sanders
Commissioner of Education
State Office Building
Hartford, Connecticut

Attention: Charles F. Ritch, Jr., Chief
Bureau of Field Services

Dear Sir:

This is in response to your letter which reads as follows:

"Sections 1564 to 1566 of the General Statutes and Sections 967d and 968d of the 1955 Supplement to the General Statutes establish a state reimbursement program for certain towns in our state for monies spent transporting elementary school children.

"Further, the 1957 General Assembly enacted Public Act Number 547 concerning transportation services for private school children when such schools are not conducted for a profit.

"Recently, we received an inquiry from a superintendent of schools whose community receives state reimbursement for elementary school transportation. He asked if his community, in light of the above-mentioned statutes, is eligible to be reimbursed for transportation of elementary school children transported to non-public schools in his community.

"With the above information as a background, may we ask your opinion on the following specific questions:

"If a town is now eligible for reimbursement for the cost of transporting elementary school children to public schools and transports children to non-public schools in accordance with the provisions of Public Act Number 547, 1957, is that town eligible for state aid reimbursements for the cost of transporting such non-public school children?"

Section 1 of Public Act No. 547 provides the following:

"Any town, city, borough or school district may provide, for its children attending private schools therein, not conducted for

profit, when a majority of the children attending such school are from such municipality, any transportation services provided for its children attending public schools. Any school municipality, which on the effective date of this act is providing such services, may continue to furnish the same until an official determination to the contrary is voted under the provisions of section 2 of this act."

Section 2 of the Act sets forth the procedure for determining the question of transportation for children attending private schools by referendum.

In the analyzation of the Act in question, it becomes apparent that the provisions in Section 1 thereof constitute permissive rather than mandatory legislation. It becomes apparent that the Act does not impose any obligation or duty upon any town to establish and maintain transportation service for school children attending private schools. The Act bestows upon towns, maintaining transportation service for children attending public schools, the right to extend by prescribed procedure such service to children attending private school.

It is obvious that with the voluntary establishment and maintenance by a town of transportation service for children attending private schools, under the recent legislation, there will be involved additional expense. The statute makes no reference to the cost of such service, nor is there any indication therein as to how the same is to be met.

The question for determination is whether the costs involved in the transportation of private school children is the sole responsibility of the town, or may the cost be shared by the State under the statutes relating to the transportation of children to and from elementary schools.

It seems to us that the reimbursement statutes mentioned in your letter cannot be made applicable to the transportation of non-public school children.

"It is a fundamental rule of construction that statutes are to be read in the light of attendant conditions and the state of law existent when enacted. In other words, statutes are to be construed as they were intended to be understood when enacted. 25 R.C.L., 959, Section 215; 37 Ohio Jurisprudence, 504 et seq., Section 274 et seq." Ursuline Academy v. Board of Tax Appeals, 49 N.E.2d (Ohio) 674, 678.

The true rule is that statutes are to be construed as they were intended to be understood when they were passed. Statutes are to be read in the light of attendant conditions and the state of law existent at the time of their enactment. The words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted. 25 R.C.L. Sec. 215, Page 959.

In applying the foregoing rules to the instant matter, the conclusion is reached that the reimbursement statutes are limited in their application to the transportation of children attending public schools and cannot be extended to the transportation of other children. In line with said rules, the reimbursement statutes must now receive the same construction which they received at the time of their enactment. The phrase "transportation of children to and from elementary schools" in Section 1567 of the General Statutes was understood at the time of its enactment in 1931 to mean the transportation of children to and from the public schools of a town.

Again, under certain rules of statutory construction, a statute may be construed in connection with other statutes. It is said that "Where statutes are part of a general system relating to the same class of subjects, and rest upon the same reason, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish. 'A statute must be construed with reference to the whole system of which it forms a part.' Lewis' Sutherland Statutory Construction, Vol. 2, 2nd Ed., Page 844." Opinions of Attorney General, Volume 23, Pages 158 and 314.

Public Act No. 547 does not come within the purview of the rule. It is not and cannot be a part of the system of which the other statutes belong. The statutes relating to reimbursement for transportation to and from elementary schools belong to the system of public school education of which the new Act cannot be a part, a system in which the State shares not only in the cost of transportation of the children attending elementary schools, but in the cost of their tuition as well. With a few exceptions as to the teaching of certain subjects where "private schools" are mentioned, the statutes relating to education in this State all pertain to schools which are public in nature and maintained by town boards of education.

Since the State cannot share in the cost of transportation of school children to and from

private schools, it naturally follows that such cost is the sole responsibility of the town furnishing such transportation service.

It is, therefore, our opinion that if a town, now eligible for reimbursement for the cost of transporting elementary school children to public schools, establishes and maintains transportation service for children attending non-public schools in accordance with the provisions of Public Act No. 547, it is not eligible for State aid reimbursements for the cost of transporting such non-public school children.

Very truly yours,

JOHN J. BRACKEN
Attorney General

REFERENCE

Inciting Litigation

I Introduction

A subject of increasing concern to the legislatures of several southern states is the regulation of the initiation and maintenance of litigation. This concern, heightened in recent years as a result of litigation in the race relations field, has been manifested in the enactment of a number of statutes redefining, and in some instances expanding, the offences of champerty, maintenance, barratry, running and capping.

Though no specific offenders are named, this legislation was obviously designed to provide sanctions against attorneys and organizations which might be found to be soliciting employment as legal counsel to aid in enforcement of alleged civil rights or to be encouraging persons to assert those rights in the courts. Further, some of the legislatures have conducted investigations into the activities of certain organizations to determine whether the recent statutes adequately regulate the conduct of litigation and whether the organizations are violating these laws or the Canons of Professional Ethics of the legal profession.

It is the purpose of this study to examine the recently enacted statutes regulating the initiation and maintenance of litigation and the applicable Canons of Professional Ethics. Some discussion will be devoted to the common law of cham-

perty, maintenance and barratry, and the probable effect of this body of law on the application of the more recent statutes. The Canons which are possibly relevant to the race relations controversy will be pointed out and their interpretation and application in other types of situations will be noted.

II Champerty, Maintenance and Barratry—The Common Law

A. Barratry

1. Defined

Barratry, or as it was designated at common law, "common barretry," is defined as "the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise." IV Blackstone, *Commentaries* 134 (Lewis ed. 1902). More recent authorities, taking into account the early statutory modification of the common law in this country, have defined barratry as "the practice of exciting groundless judicial proceedings with a corrupt or malicious intent to vex and annoy." See Perkins, *Criminal Law* 449, 454 (1957); 9 C.J.S., *Barratry* § 2a (1938). See also *State v. Batson*, 220 N.C. 411, 17 S.E.2d 511 (1941).

The person guilty of barratry is designated as a "barrator" or "common barrator"—that is, as a "common mover or exciter or maintainer of suits, quarrels, or parts, either in courts or elsewhere in the country." *Case of Barretry*, 8 Coke 36b, 77 Eng. Reprint 528 (1588).

2. Nature and Requisites of the Offense

Barratry, at common law and by statute in most states, is a criminal offense, usually a misdemeanor punishable by fine or imprisonment or both. *State v. Batson, supra.* The primary purpose of making such action a crime is to prevent strangers to controversies from fomenting strife and litigation.

While the offense under the early statutory modification of the common law generally requires that the interference involve litigation or judicial proceedings, see Perkins' definition, *supra*, at common law the offense probably extended to any type of activity which resulted in stirring up quarrels. Thus, in the *Case of Barretry, supra*, Lord Coke stated that a barrator is a common mover or maintainer of strife in three ways: first, in disturbing the peace; second, in taking or detaining possession of houses, lands or goods which are in controversy, by craft or deceit; and third, by sowing calumnies, etc., whereby discord and disquiet arise between neighbors. Quoted in *Atkinson v. Great Western Ins. Co.*, 4 Daly 1 (1871), *rev'd on other grounds* 65 N.Y. 531 (1875).

The definitions, it will be noted, utilize the terms "frequently" or "practice" or "common." These terms are actually the heart of the definition in the sense that they describe the very feature of barratry that distinguishes it from the other offenses made punishable in order to prevent the stirring up of strife and litigation. Barratry requires more than one act which stirs up strife and litigation; although it is not certain at the present time whether the common law required two or three such acts, it is generally held under the statutory modification of the common law that three acts are necessary. See *Lucas v. Pico*, 55 Cal. 126 (1880); Annot., 139 A.L.R. 620, 624 (1942). In *State v. Chitty*, 17 S.C.L. (1 Bail) 379 (1830), the court said:

> "It is the aggregate of all the barretrous acts which constitute barretry; and the longer the list, and the more extended in point of time, the more aggravated is the offense. It is the conduct of a man through life, from which his character is drawn; and it is the habit of intermeddling, which stamps on him the character of barretor."

Under the early common law, the crime of barratry probably was limited to the exciting of civil strife, apparently not including the stirring up of criminal prosecutions. It has been argued that the crime of barratry should not be extended to criminal prosecutions, since it is not only the privilege but also the duty of every citizen to bring criminals to justice. See 9 C.J.S., *Barratry* § 2a (1938). At the present time, however, the offense can arise from inciting public prosecutions as well as civil suits, and the law

affords the person who takes a public interest in bringing offenders to justice protection by looking to the motive which prompted him to interfere. See *State v. Chitty, supra.*

It has also been said that it is immaterial whether the suit is well-founded or just. *Ibid.* However, the motive behind inciting such suits is very material, and it has been held that without an intention or a malicious design to oppress and harass another person by inciting the litigation, there can be no crime of barratry. See *Com. v. M'Culloch,* 15 Mass. 227 (1818); *State v. Chitty, supra.* It will be noted in this regard that Perkins's definition, which takes into account the statutory modification of the common law, requires both the lack of a well-founded claim or defense and a "corrupt and malicious intent to vex and annoy." *Op. cit. supra,* at 449, 454.

The improper solicitation of business by an attorney at law, either personally or by the employment of agents, has been held to come within the crime of barratry. In *Ackerman v. State,* 124 Tex. Crim. Rep. 125, 61 S.W.2d 116 (1933) the court found that the barratry statute included:

> "any attorney at law who shall seek or obtain employment in any suit or case at law, or in equity, to prosecute or defend the same by means of personal solicitation of such employment, or by procuring another to solicit for him employment in such case." See also *Gunnels v. Atlanta Bar Ass'n,* 191 Ga. 366, 12 S.E.2d 602 (1940); *Gammons v. Johnson,* 76 Minn. 76, 78 N.W. 1035 (1899).

B. Champerty and Maintenance

1. Defined

The early common law apparently defined maintenance as an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. See *Thompson v. Marshall,* 36 Ala. 504 (1860); 10 Am. Jur., *Champerty and Maintenance* § 1 (1937). While this early common-law definition does not seem to require the existence of litigation, pending or contemplated, the later, classical definition of maintenance makes litigation an essential element:

> "Maintenance is . . . an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or other wise, to prosecute or defend it." IV Blacksone, *Commentaries* 135 (Lewis ed. 1902).

The requirement of litigation in the later common-law definition illustrates, perhaps, a shift in emphasis; indeed, it would seem that the emphasis in the past few generations has been on whether the conduct in question "tends to obstruct the course of justice, or is against good policy in tending to promote unnecessary litigation, and is performed under a bad motive." 10 Am. Jur., *Champerty and Maintenance* § 1 (1937). See also, Perkins, *Criminal Law* 448 (1957). Moreover, this shift in emphasis is said to be the result of "an attempt on the part of the courts to carve out of the old law such remnant as is consonant with our modern notions of public policy." Annot., 139 A.L.R. 621, 648 (1942). In order to meet the needs of the present legal doctrine of maintenance, therefore, there has been some attempt to draft a new definition which will more adequately describe the offense of maintenance:

> "[M]aintenance means the act of one improperly, and for the purpose of stirring up litigation and strife, encouraging others either to bring actions or to make defenses which they have no right to make, and the term seems to be confined to the intermeddling in a suit of a stranger or of one not having any privity or concern in the subject matter, or standing in no relation of duty to the suitor." 10 Am. Jur., *Champerty and Maintenance* § 1 (1937).

Champerty is, in effect, a variation of the law of maintenance, or, as it is usually stated, it is a "species of maintenance." Blackstone defined champerty as:

> "a bargain with a plaintiff or defendant, *campum partire,* to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense." *Op. cit., supra,* at 135.

In *Rust v. Larue,* 14 Ky. (4 Litt.) 412 (1823), the court held a contingent fee contract between an attorney and his client came within the following definition of champerty: "Champerty which is maintenance of the strongest character, is nothing else than an agreement to aid in a suit, and then to divide the thing recovered." *Id.* at 417. In other words, champerty is maintenance plus an agreement whereby a stranger

to the suit agrees to bear a part or all of the expenses of the litigation in consideration of receiving a part or all of the proceeds of the suit, if it is successful. See 10 Am. Jur., *Champerty and Maintenance* § 2 (1937).

> "Champerty is the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it. . . . Every champerty is maintenance, but every maintenance is not champerty; for champerty is but a species of maintenance, which is the genus." *Brown v. Beauchamp*, 5 T.B. Mon. 413 (Ky. 1827).

2. Nature and Essential Elements

Perhaps the most essential element of both champerty and maintenance is the requirement that the person who interferes in another person's controversy has an intention to stir up strife:

> "The offense rests in intention, and no intermeddling in suits is regarded as officious, and falling within it, if a party, under an honest, though mistaken belief, that he has an interest, interferes for its protection. . . . The essential element of the offense—the intent to stir up strife, the officious intermeddling in a suit in which there was not an honest belief of an interest—is absent from this transaction." *Vaughan v. Marable*, 64 Ala. 60 (1879). See also *Thompson v. Marshall, supra.*

In other words, there must be a wrongful intention underlying the intermeddling; it must be improper or unlawful, and for the purpose of stirring up strife and litigation.

At the present time another essential element of both champerty and maintenance would appear to be that litigation be pending or contemplated. This is particularly true with regard to champerty, and seems to have been a requirement since the early common law rules developed. See *Rust v. Larue, supra.* Moreover, with regard to champerty, the agreement to divide the matter in controversy apparently must be given in consideration of a promise to pay the costs and necessary expenses of the litigation, in whole or in part. *Meeks v. Dewberry*, 57 Ga. 263 (1876).

Although it is apparently necessary that litigation be pending or at least contemplated, there is a split of authority on the question of whether the cause must be prosecuted or defended in a court of law or of equity. Some authorities have apparently found it sufficient if the cause is to be litigated before an administrative or quasi-judicial body. See 14 C.J.S., *Champerty and Maintenance* § 1a (1939).

There has been some question concerning whether there must be actual assistance in order to constitute maintenance, or whether it will be sufficient if there is merely an offer of assistance. See Annot., 15 Am. Dec. 317 (1910). Generally, however, it is doubtful that actual assistance, rather than a mere offer of assistance, is an essential element. See *Gilman, Son & Co. v. Jones, infra.*

3. Distinctions

At common law a rather sharp distinction was drawn between champerty and maintenance. Where there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintenance only, whereas if the party stipulated that he was to receive a share of the thing in controversy, then he would be guilty of champerty. See *Quigley v. Thompson*, 53 Ind. 317 (1876). Maintenance prohibits officious intermeddling in another person's controversies, without regard to the form of the intermeddling; champerty, on the other hand, is concerned with unlawful maintenance which is accomplished by an agreement to divide the thing in controversy if the litigation is successful. While this distinction was certainly clear at the common law, it has been said that there is a tendency at the present time to use the two terms as if they were interchangeable. See 10 Am. Jur., *Champerty and Maintenance* § 2 (1937).

The primary distinction between the doctrines of champerty and maintenance and that of barratry is found in the fact that more than one act is required in order to make the person who interferes in another person's controversies guilty of the crime of barratry, while only one such act is necessary in order to constitute either champerty or maintenance. Barratry, in other words, is the "habit" of doing the very things prohibited by champerty and maintenance. Another distinction is also found. While barratry is exclusively a criminal offense, champerty and maintenance also affect matters of civil liability. Thus, maintenance is an actionable tort, while champerty will void a contract which comes within its prohibition. Indeed, the civil elements of champerty and maintenance were, until the

recent enactments of the southern states, the only part of the common-law doctrines which had any practical signficance, the criminal offenses having become obsolete. See *Gilman, Son & Co. v. Jones*, 87 Ala. 691, 5 So. 785, 7 So. 48 (1888).

C. Development and Modification

The common-law doctrines of champerty, maintenance and barratry were greatly influenced by the feudal society and the rudimentary modes of trial existing at the time of their development. Trials of legal controversies were not easily undertaken, the common forms including trial by battle, by ordeal or by compurgation. The influential and wealthy feudal lord was rather obviously in a position to influence the course of the trial; for example, if trial was by battle, a "champion" could be hired, or if trial was by compurgation, the outcome depended on the number of "oath-takers" the party could bring into court. Oppression of the poor litigant was the rule, rather than the exception. See Radin, *Maintenance by Champerty*, 24 Calif. L. Rev. 48, 58-59 (1935).

> "When this doctrine was established, lords, and other large landowners, were accustomed to buy up contested claims against each other, or against commoners with whom they were at variance, in order to harass and oppress those in possession. On the other hand, commoners, by way of self-defense, thinking they had title to land, would convey a part of their interest to some powerful lord in order through his influence to secure their pretended right. The want of any sufficient written conveyances, and records of land titles, and the futile relation of villein and liege lord, afforded great facilities for the combinations and oppressions which followed this state of things. The power of the nobles became mighty in corrupting the fountains of justice, and subverting the freedom and independence of the judicial tribunals." *Hovey v. Hobson*, 51 Maine 62, 64, (1863).

These conditions were not, however, the only reasons for the development of this body of law. Professor Radin, for example, cites the general attitude of a community against interference by a stranger in another person's controversies, and the notion, strengthened with the coming of Christianity, that litigation was itself something to be discouraged. *Op. cit. supra*, at 48, 56. See also, *Davis v. Settle*, 43 W.Va. 17, 26 S.E. 557, 560, (1896) ("maintenance tended to suppress justice and truth, work delay, and stir up strife, and all maintenance of a suit by a stranger was at common law unlawful, and was considered malum in se, as it permitted the wealthy to oppress the poor, and rob them of their small inheritances."); *Thurston v. Percival*, 18 Mass. (1 Pick) 415 (1823).

As the nature of the judicial process changed, and society made the transition from the feudal system, the common-law of champerty, maintenance and barratry also underwent modification. The change was gradual, but the end result was the relaxation of the harsh applications of the earlier rules:

> "The modification of the ancient law of maintenance has been carried to such lengths that it has been said that the whole doctrine is now confined to strangers who, having no valuable interest in a suit, pragmatically interfere in it for the improper purpose of stirring up litigation and strife, and that champerty does not exist in the absence of this characteristic of maintenance." Annot., 139 A.L.R. 620, 639-40 (1942).

Perhaps the most important part of this modification of the common law is found in the development of the exceptions to the earlier absolute prohibition, in the form of recognized justifications for aiding another in bringing suit. Blackstone recognized several of these: "A man may, however, maintain the suit of his near kinsman, servant or poor neighbor, out of charity and compassion, with impunity." *Op. cit. supra* at 135. See also 1 Story, *Contracts* § 711 (5th ed. 1874) in an early Alabama case, the tendency of the courts to relax the earlier common-law rules was noted:

> "There is much reason . . . for the relaxation of the old doctrines pertaining to the subject so that they may be adapted to the new order of things in the present highly progressive and commercial age. Necessity and justice have, accordingly, forced the establishment of recognized exceptions to the doctrines of these offenses. Among these may be enumerated the following instances: Relationship by blood or marriage will often now justify parties in giving each other as-

> sistance in law suits; and the relation of attorney and client; or the extension of charitable aid to the poor and oppressed litigant; and especially is an interference in a lawsuit excusable when it is by one who has, or honestly believes he has, a valuable interest in its prosecution." *Gilman, Son & Co. v. Jones, supra,* 5 So. 786 at 787.

Generally, the exceptions to the common-law doctrines are applicable only if the interference in the litigation is not motivated by a desire to profit or to speculate for personal gain. Thus, it has been said that the exceptions apply only to maintenance and not to champerty. See Annot., 139 A.L.R. 620, 638-39 (1942). However, the requirement of wrongful intent, see discussion, *supra,* and the general tendency on the part of the courts to liberalize the common-law doctrines have largely counteracted this restriction, and champerty is no longer applied in all its strictness.

1. Interest

Justification for interfering in litigation may be found if the person interfering therein has, or honestly believes he has, an interest in the litigation or in the subject matter thereof, whether that interest be "great or small, certain or uncertain, vested or contingent." 1 Story, *Contracts* § 711 (5th ed. 1874). See also *Vaughan v. Marable, supra; Moffett v. Commerce Trust Co.,* 283 S.W. 2d 591 (Mo. 1955) (appointment of defendant as executor of an estate, although void, gave it sufficient interest to justify interference in certain litigation concerning the estate). The acquisition of the interest must not, of course, come within the scope of the doctrine of champerty. However, once the interest or honest belief in such an interest is established, the fact that the person has thereafter acquired an additional interest in the litigation seems to be immaterial. See 10 Am. Jur., *Champerty and Maintenance* § 4 (1937).

2. Relationship

If the intermeddler and the party to the suit are related by affinity or consanguinity, or if there is a relationship of trust and confidence between them, interferences in the suit may well be justifiable. See *Gilman, Son & Co. v. Jones, supra; Brown v. Beauchamp, supra;* Annot., 130 A.L.R. 621, 637 (1942).

The exception of relationship by blood or marriage is recognized in *Charles v. Phillips,* 252 S.W.2d 920 (Ky. 1952), but was declared inapplicable to a champertous contract. In that case a father conveyed to his daughter certain property, part of which was held in the father's wife's name, in consideration of a sum of money to be used by the father to seek a divorce and restoration of the property. This transaction was held to be champertous under a statute which codified the common law, the exception as to kinsman being inapplicable since the daughter was interfering for profit. The following excerpt from Corpus Juris Secondum was quoted by the court as the modern rule:

> "A person who is related by ties of consanguinity or affinity to either of the parties to a suit may rightfully assist in the prosecution or defense of such suit either by furnishing counsel or by contributing to the expense thereof; but the reason for the rule ceases and the rule is not applicable where a kinsman meddles in or maintains the suit for the purpose of personal speculation or profit. Otherwise stated, relationship by blood or marriage may justify maintenance, but not champerty."

The exception based on a relationship of trust or a fiduciary relationship between the intermeddler and the suitor is well-stated by Story:

> "[T]he sole object of the rule as to champerty and maintenance . . . [is] to prevent entire strangers from fomenting litigation by officious assistance. If, therefore, there be any privity of interest growing out of peculiar relations of trust or confidence between the parties, independent of the assistance rendered to carry on the suit,—. as if they stand in relation of landlord and tenant, father and son, master and servant, husband and wife,—mere assistance by money or services would not amount to maintenance." 1 Story, *Contracts* § 711 (5th ed. 1874). See also Annot., 139 A.L.R. 621, 637 (1942).

It should be noted at this point that Canon 28 of the American Bar Association's Canons of Professional Ethics recognizes this exception:

> "It is unprofessional for a lawyer to volunteer advice to bring a lawsuit except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but is indictable at common law."

3. Benevolent Aid

Rendering aid to a poor or oppressed litigant is also excepted from the application of the common-law doctrines, if the assistance is rendered "from motives of friendship and charity, and not of speculation." 1 Story, *Contracts* § 711 (5th ed. 1874). See also 14 C.J.S., *Champerty and Maintenance* § 24 (1939); 10 Am. Jur., *Champerty and Maintenance* § 4 (1937).

D. Present Status

Excluding for the moment the recently enacted statutes with regard to the criminal offenses of maintenance, barratry, running and capping, it is difficult to ascertain the present status of the common-law doctrines of champerty, maintenance and barratry. As previously noted, there is certainly a tendency on the part of the courts to liberalize these common-law rules, and champerty and maintenance have largely disappeared as criminal offenses. Moreover, it would seem that the doctrines are now limited to interference by a complete stranger to the litigation who is motivated by a wrongful intent—*i.e.*, to stir up groundless litigation or to profit personally from such litigation.

The social, political and economic background which gave rise to the development of these doctrines has disappeared; the rules, insofar as they have survived, have been adapted to the needs of modern society in the prevention of abuses of legal processes. Generally, the purpose and functions of these doctrines—namely, to prevent the perversion of the remedial processes of the law to vehicles of oppression—have been assumed by the bar associations, and in many instances, the doctrines of champerty, maintenance and barratry, whether common law or statutory, are directed primarily against lawyers or their agents. See Perkins, *op. cit. supra*, at 452.

The nature and present status of these common-law doctrines is summed up by Professor Radin as follows:

> "Champerty, embracery and barratry were crimes, pleas of the Crown. Their suppression was in the interests of the public welfare. Maintenance in general was an actionable wrong, a tort in modern terminology; and persons who suffered from it could obtain compensation. As crimes, they have become obsolete. Some of them are still found in our penal codes. But actual prosecution under them is rare in either England or the United States. As a tort, maintenance is more likely to be lost in such specific torts as slander, libel, conspiracy or malicious prosecution." *Op. cit. supra*, at 67.

III. Regulation of Litigation—Recent Statutes

In general, the recent statutory regulation of the initiation and maintenance of litigation has taken the form of re-defining and extending the criminal offenses of champerty, maintenance and barratry. Although there is some variation, at least in the wording of the statutes, they are quite similar in effect. Virginia has enacted the most comprehensive set of statutes on this subject, including laws on maintenance, barratry and running and capping, and some of these statutes have been the pattern for legislation in other states—*e.g.*, the Tennessee barratry law. The Mississippi statute on maintenance served as the basis for both the Arkansas and Virginia legislation on that particular subject. Georgia and South Carolina seem to have developed their own statutes, both of which define the crime of barratry, and Arkansas apparently has combined the provisions of both of these statutes in its statutory definition of barratry.

A. Barratry

1. Georgia

Act No. 514 of the 1957 Session of the Georgia General Assembly, 2 Race Rel. L. Rep. 501, sustains four separate definitions of the crime of barratry, all of which are found in section one. The first of these is quite similar to the common-law definition of barratry:

> "Any person who shall frequently engage in exciting and stirring suits and quarrels between individuals, or between an individual and the State or between an individual and any legal entity, either at law or otherwise shall be guilty of the crime of barratry."

The remainder of the definitions, however, would seem to extend the scope of the crime far

beyond that now recognized at common-law, particularly in view of the fact that a single act appears to be sufficient to constitute the offense. The second and fourth definitions are concerned with essentially the same type of conduct—namely, committing an act which tends to breach the peace "with the purpose of or intention of such act resulting in a suit or litigation, either civil or criminal." The second definition is directed against the person who actually commits the act, while the fourth is directed against a person "who counsels, proposes, encourages, aids or assists another" in committing such an act.

The third definition of barratry includes conduct condemned by the common-law of maintenance, making it a crime to seek out and propose to another "that they present and urge a suit against another person, the State of Georgia, the United States or any other legal entity."

Section two of the Act expressly makes it a crime for two or more persons to conspire to commit the crime of barratry.

Section three contains a provision which is fairly common in these statutes, defining the term "person" as used therein to include "a corporation, whether profit or non-profit, and associations."

2. South Carolina

The crime of barratry is also the subject of the South Carolina Act No. 55, 1957 Session of the South Carolina General Assembly, 2 Race Rel. L. Rep. 502. As defined in this Act, the crime of barratry includes various activities condemned by the common law of champerty, maintenance and barratry, as well as by the Canons of Professional Ethics. Section one of the Act is divided into two comprehensive parts, each with a number of subsections. The first part of this section begins with the general provision that any person "who shall wilfully solicit or incite another to bring, prosecute or maintain an action, at law or in equity" shall be guilty of barratry if he also is seeking employment for himself or for another, or has "no direct and substantial interest in the relief thereby sought," or intends to use the proceeding "to distress or harass any party," or pays or promises to pay to any party money or something of value, or pays or promises to pay to any other person any money or other thing of value to bring about the prosecution or maintenance of the action. [Subsections (d)-(e)].

The second portion of section one is concerned solely with the person who brings the suit:

> "Any person who shall wilfully bring, prosecute or maintain an action, at law or in equity, in any court having jurisdiction within this state and who:
>
> "(1) has no direct or substantial interest in the relief thereby sought, or
>
> "(2) thereby seeks to defraud or mislead the court, or
>
> "(3) brings such action with intent to distress or harass any party thereto, or
>
> "(4) directly or indirectly receives any money or other thing of value to induce the bringing of such action, shall be guilty of the crime of barratry."

As in the Georgia Act, "person" is defined to include "corporations and unincorporated associations," and the law of South Carolina providing for the enforcement of criminal liability against a corporation is made applicable to unincorporated associations convicted by barratry. [Section 3].

The remaining sections are concerned primarily with the punishment of offenders, and in addition to provisions for fine and imprisonment, the Act contains the rather common provision that a corporation or association found guilty of barratry is "forever barred from doing any business or carrying on any activity within this State." [Section 4].

Although the other statutes declare that all laws inconsistent with the provisions of the Act are thereby repealed, the South Carolina Act makes its provisions cumulative, and declares that the Act "shall not be construed as repealing any existing statute or the common law of this State with respect to the subject matter of any of the provisions hereof." [Section 7]

3. Arkansas

As previously noted, the statute passed by the Arkansas General Assembly combined the definitions of barratry utilized by the South Carolina and Georgia Acts. Act No. 14 (H.B. 12), 1958 Extraordinary Session of the Arkansas General Assembly, 3 Race Rel. L. Rep. 1053. Subsections A through D of section one, adopt substantially the same four definitions as those set forth in section one of the Georgia Act, *supra*, while subsection E through J(1)-(4) are substantially the same as section one of the South Carolina Act, *supra*. The provisions of the

Arkansas statute are, like those of South Carolina, declared to be cumulative.

Also, the Arkansas legislature amended the exceptions to the Arkansas statute prohibiting corporations of associations from practicing law. Act No. 11 (H.B. 9), 1958 Extraordinary Session of the Arkansas General Assembly, 3 Race Rel. L. Rep. 1052, eliminated the following exceptions:

> ". . . nor shall it apply to organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy." Ark. Stats. § 25-209 (1947).

4. Virginia and Tennessee

The Virginia barratry statute, 1956 Extra Session Acts of Virginia, c. 35, 2 Race Rel. L. Rep. 1017, is the basis for the Tennessee Act, 1957 Public Acts of Tennessee, c. 104, 2 Race Rel. L. Rep. 503, which is codified in Tenn. Code Ann. § 39-3405 (Supp. 1958). The Virginia Act was modified by the Tennessee legislature only insofar as such modification was necessary to conform to Tennessee legislative practice. Therefore, the Virginia Act will be the basis of this discussion.

The Act in section two declares that it is unlawful to engage in barratry, as defined in other parts of the Act. Section one defines various terms as follows:

> "(a) 'Barratry' is the offense of stirring up litigation.
>
> "(b) A 'barrator' is an individual, partnership, association or corporation who or which stirs up litigation.
>
> "(c) 'Stirring up litigation' means instigating or attempting to instigate a person or persons to institute a suit at law or equity.
>
> "(d) 'Instigating' means bringing it about that all or part of the expenses of the litigation are paid by the barrator or by a person or persons (other than the plaintiffs) acting in concert with the barrator, unless the instigation is justified.
>
> "(e) 'Justified' means that the instigator is related by blood or marriage to the plaintiff whom he instigates, or that the instigator is entitled by law to share with the plaintiff in money or property that is the subject of the litigation or that the instigator has a direct interest in the subject matter of the litigation or occupies a position of trust in relation to the plaintiff; or that the instigator is acting on behalf of a duly constituted legal aid society approved by the Virginia State Bar which offers advice or assistance in all kinds of legal matters to all members of the public who come to it for advice or assistance and are unable because of poverty to pay legal fees.
>
> "(f) 'Direct interest' means a personal right or a pecuniary right or liability."

Excluded from the operation of this Act by the remainder of section one are attorneys who are parties to contingent fee contracts and who do not indemnify their clients against the payment of costs, as well as certain types of cases—*e.g.*, suits involving annexation or zoning issues or the title to or possession of real or personal property.

In addition, the Act provides that any person "who aids and abets a barrator by giving money or rendering services to or for the use or benefit of the barrator for committing barratry" is also guilty of barratry. [Section 4]

Moreover, the Act allows the Attorney General or an attorney for the Commonwealth to bring suit in equity to enjoin barratry. [Section 5].

The penalties for barratry are similar to those provided for in the other Acts. The additional penalty relating to attorneys licensed to practice by the state—if the attorney is found guilty of barratry, his license to practice is to be revoked—is similar to section 2 of the South Carolina statute.

B. Maintenance

Mississippi, Arkansas, and Virginia

The Mississippi Act (H.B. 33, 1956 Session of Mississippi Legislature, 1 Race Rel. L. Rep. 451) makes it unlawful for any "person, firm, partnership, corporation, group, organization, or association, either incorporated or unincorporated," to do any of the activities included in the following three subsections of section one, either before or after legal proceedings have been commenced:

> "(1) to promise, give, or offer, or to conspire or agree to promise, give, or offer,
>
> "(2) to receive or accept, or to agree or conspire to receive or accept,
>
> "(3) to solicit, request, or donate, any money, bank note, bank check, chose in

action, personal or real property, or any other thing of value, or any other assistance as an inducement to any person to commence or to prosecute further, or for the purpose of assisting such person to commence or prosecute further, any proceeding in any court or before any administrative board or other agency of the State of Mississippi, or in any United States court located within the said state."

Section three requires as a condition precedent to the prosecution of any proceeding before a court or administrative agency, including an appeal from a judgment, order, etc., of a lower court or administrative agency, that an affidavit be filed in which the affiant swears that he has "neither received, nor conspired to receive, any valuable consideration or assistance whatever as an inducement to the commencement or further prosecution of the proceeding in this matter." An attorney for any party must also file a similar affidavit under section 4. The remaining provisions of the Act provide for punishment of violations of the Act, for testimony as to violations, or for perjury in filing a false affidavit.

Though apparently patterned on the Mississippi legislation, the Virginia Act. 1956 Extra Session Acts of Virginia, c. 36, 2 Race Rel. L. Rep. 1018, contains one rather important provision not included in the Mississippi statute or in the Arkansas statute, Act No. 16 (H.B. 14) 1958 Extraordinary Session of the Arkansas General Assembly, 3 Race Rel. L. Rep. 1057, which is also based on that of Mississippi:

"(b) It shall be unlawful for any person, not related by blood or marriage or who does not occupy a position of trust or a position in loco parentis to one who becomes the plaintiff in a suit or action, who has no direct interest in the subject matter of the proceeding and whose professional advice has not been sought in accordance with the Virginia Canons of legal ethics, to advise, counsel or otherwise instigate the bringing of a suit or action against the Commonwealth of Virginia, any department, agency or political subdivision thereof, or any person, acting as an officer or employer for either or both or any of the foregoing." *Op. cit. supra*, § 1.

The legislative intent behind these three Acts is found in the section exempting certain persons and certain types of suits from the operation of the Acts:

"Nothing in this act is intended to be in derogation of the constitutional right of real parties in interest to employ counsel or to prosecute any available legal remedy; the intent, as herein set out, is to prohibit and punish, more clearly and definitely, champerty, maintenance, barratry and the solicitation or stirring up of litigation, whether the same be committed by licensed attorneys or by others who are not real parties in interest to the subject matter of such litigation." 1 Race Rel. L. Rep. at 453 (Mississippi Act, § 7).

C. Running and Capping

VIRGINIA

Virginia is the only state which has enacted recent legislation with regard to running and capping, and that legislation only amended various sections of the Code of Virginia pertaining to unprofessional conduct of attorneys, by broadening the provisions thereof with regard to the solicitation of business. 1956 Extra Session Acts of Virginia, c. 33, 2 Race Rel. L. Rep. 1025. Section 54-74(6) of the Virginia Code, which before amendment defined the phrase "malpractice, or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct" to include the improper solicitation of legal business or employment, was broadened by adding to the definition the acceptance of employment or compensation from any person or organization which had violated the section making it unlawful to engage in running and capping. A proviso to this action states that nothing therein is to be construed to prohibit an attorney from representing persons accused of running and capping.

Section 54-78 of the Code, which defines the terms "runner" or "capper" was also amended by this Act.

"(1) A 'runner' or 'capper' is any person, corporation, partnership or association acting in any manner or in any capacity as an agent for an attorney at law within this state *or for any person, partnership, corporation, organization or association which employs, retains or compensates any attorney at law in connection with any*

judicial proceeding in which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability, in the solicitation or procurement of business for such attorney at law *or for such person, partnership, corporation, organization, or association in connection with any judicial proceedings for which such attorney or such person, partnership, corporation, organization or association is employed, retained or compensated.*

"*The fact that any person, partnership, corporation, organization or association is a party to any judicial proceeding shall not authorize any runner or capper to solicit or procure business for such person, partnership, corporation, organization or association or any attorney at law employed, retained or compensated by such person, partnership, corporation, organization or association.*" (*italics* indicate the amendments).

Section 54-79 of the Code, which provides that it is unlawful to act as a runner or capper, was amended in a few particulars to make it conform to the amendments of the other sections.

IV. Unprofessional Conduct

Besides the threat of possible involvement in the common law and statutory prohibitions against champerty, maintenance and barratry, individuals and organizations concerned in race relations controversies may be open to the charge that some of their activities are in violation of certain of the Canons of Professional Ethics promulgated by the American Bar Association and made binding in many states by statute or court order. Attorneys acting individually or as state or local officials, and organizations acting through the agency of attorneys all come within the sanctions of these rules governing professional conduct and unauthorized practice of law. Though of course none of the canons was conceived with the current race relations developments in mind, yet the general situations envisaged and the general principles expounded extend to the problems arising out of a wide variety of circumstances. As indicated by Judge Vanderbilt:

> "The Canons of Professional Ethics undertake to codify in convenient form the traditions and practice that have been recognized over the centuries as part of the common law with respect to the lawyer's obligations to the courts and the administration of justice, to the public and his clients, and to his profession and his fellow practitioners. They are as obligatory on him as if cast in statutory form, as indeed they are in large part in many states." *In re Rothman*, 12 N. J. 528, 97 A.2d 621, 625 (1953).

No attempt will be made to point out and pass upon the propriety of specific activities connected with race relations controversies which may lead to violations of the canons. Rather, the purpose will be to call attention to the various canons which may be relevant in this field, and to give some indication of how their principles have been interpreted and applied in cases arising out of different, but perhaps analogous, situations.

A. Stirring up Litigation

Most common among the charges of unprofessional conduct in race relations matters are those pertaining to the very activities against which the champerty, maintenance and barratry statutes are aimed: stirring up controversies over legal rights, inducing persons to bring suits, financing litigation for other persons, and so on. Though these statutes refer in broad terms to actions which constitute criminal offenses when committed by any member of the public, it has long been recognized that such conduct has especially objectionable consequences when carried on by an attorney.

> "[I]f the offender (as is too frequently the case) belongs to the profession of law, a barrator who is thus able as well as willing to do mischief ought also to be disabled from practicing in the future. And indeed it is enacted, by statute 12 Geo. I c. 29, that if any one who hath been convicted of forgery, perjury, subornation of perjury, or common barratry, shall practice as an attorney, solicitor, or agent, in any suit, the court, upon

complaint, shall examine it in a summary way, and, if proved, shall direct the offender to be transported for seven years." IV Blackstone, *Commentaries* 134 (Lewis ed. 1902).

In more recent times, the charge has been made that:

> "[T]he lawyers have moved from the position of being the occasional and more or less casual instruments of maintainers into the front line of this form of offending." Radin, *Maintenance by Champerty*, 24 Calif. L. Rev. 48, 68 (1935).

1. Canons 27 and 28: Solicitation of Employment and Stirring up Litigation

Recognizing both the nature and the magnitude of this evil, the American Bar Association has drafted two canons dealing directly with these matters. Canon 28, which is the most pointed in this regard, declares, in part:

> "It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes. . . ."

Canon 27, a long and complex denunciation of advertising by members of the legal profession, is regarded as a complement to Canon 28, and the two rules are frequently considered as operating in conjunction. The Supreme Court of Minnesota has made the following broad assertion as to the scope of their application:

> "Canons No. 27 and No. 28 of the American Bar Association condemn all solicitation for business, not warranted by personal relations, and term it as 'unprofessional'. These Canons also disapprove and say that it is disreputable to hunt up causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims . . . in order to secure them as clients . . . ." *In re Greathouse*, 189 Minn. 51, 248 N.W. 735, 740 (1933).

2. Prohibited Activities

Numerous strict applications of these canons by bar association ethics committees confirm the opinion that "all solicitation for business" is within the prohibition. In one notable instance, the American Bar Association Grievances Committee condemned the action of an attorney, engaged in international practice, who, upon learning that a convention between the governments of United States and Mexico had made certain claims collectible against the latter, sent out a circular letter to a number of persons holding such claims, informing them that their rights could now be enforced. Not only did the attorney carefully refrain from asking for professional employment from the claimant, but in the letter he explained how the claims should be presented and that no attorney need be engaged to file them. In answer to the accused's argument that he was not only not acting improperly but was instead carrying out a duty to the public, the committee declared:

> "The contention that there is any duty upon a lawyer, in any branch of the law, to furnish presumptive claimants or litigants, with whom he has had no previous personal or professional relations which would justify such action, information as to how and when their claims must be presented, is untenable. The furnishing of such information by a lawyer to such persons, on his letterhead and over his signature, necessarily carries with it the implication that the lawyer is familiar with the subject and would be glad to be employed in connection therewith. As such it becomes a form of solicitation. *Canon 27* condemns advertising and soliciting of any nature." American Bar Association, *Opinions of the Committee on Professional Ethics and Grievances* (1957) Op. 9.

In another case, in which an attorney had made an unsolicited investigation of an estate being administered in probate court and had discovered unknown heirs and informed them of their interest in the estate in order to obtain employment as their attorney, the Committee condemned such activity as tending to stir up strife and litigation, and concluded: "A lawyer should bear in mind that he should not hide

behind the cloak of technicalities in his relation with the public and his profession." A.B.A. Op. 173. See also, New York City Bar Association Committee on Professional Ethics (1956) Op. 69, and New York County Lawyers' Association Committee on Professional Ethics (1956) Op. 310. In Opinion 310, the Committee declared that it was improper for an attorney to write a letter to a person not an acquaintance, advising him of a cause of action and suggesting that he consult his own attorney on the matter.

Thus, it appears that when an attorney, without previous professional or personal connection with a member of the public, makes a point of informing the latter of the existence or enforceability of his legal rights, the former may be guilty of unprofessional conduct, even though he does not request or suggest that he be employed as counsel. The obvious inference in the situation is sufficient to brand the action as an implied solicitation of employment. However, an attorney who is under a general retainer contract with a client may properly inform the client of the existence of causes of action or other legal rights, since the employment relation has already been established, and under it the attorney is obligated to provide general legal services.

What is perhaps the outer boundary of this phase of the prohibition against solicitation is disclosed in New York County Lawyers' Association Opinion 199. The Committee there stated that even if the government were attempting to collect an admittedly illegal tax because the taxpayer was known not to have adequate counsel and therefore not to be aware of his rights, it would be improper for an attorney voluntarily to inform the taxpayer of the facts and of his rights. Even though the attorney did not advise the bringing of suit nor suggest his employment as counsel, the Committee thought that the communication of the facts "upon which claims substantial right might be urged or prosecuted, is tantamount to volunteering advice to bring a law suit and is comprehended within the condemnation of Canon 28."

The very severity of the restriction expressed in this opinion serves to emphasize the fact that these two canons are designed not only for the purpose of holding the members of the legal profession aloof from ordinary business promotion methods, but also of enforcing the common law proscriptions against stirring up legal controversies and litigation. See *Chreste v. Commonwealth* 171 Ky. 77, 186 S.W. 919 (1916), aff'd 178 Ky. 311, 198 S.W. 929 (1917).

3. Permissible Activities

Opinion 148 of the American Bar Association Committee points out an exception to the general rule derived from Canons 27 and 28. This opinion concerned the propriety of an offer by a group of lawyers to render gratuitous service to "any American citizen, however humble, [who] is without means to defend his constitutional rights in a court of justice." This group of lawyers, known as the National Lawyers Committee, in conjunction with the American Liberty League, maintained that the National Labor Relations Act was unconstitutional, and because of that conviction (and general opposition to New Deal legislation), the offer was made to defend indigent Americans who believed their constitutional rights were being violated.

The ethical problem involved in this situation was approached by the Committee on Professional Ethics and Grievances from two angles—the actual rendering of gratuitous services by the National Lawyers Committee, and the publication of the offer of these services by radio, pamphlets, and otherwise. The first matter was disposed of in summary fashion by likening the activities of the National Lawyers Committee to those of established legal aid societies. No canon was thought to be involved here. However, publication of the offer invoked a consideration of Canons 27 and 28. The American Bar Association Committee held Canon 27 inapplicable to the instant case since its prohibition is aimed at "commercialization of the profession." Canon 28 was held not to apply in this case because "no substantial increase of litigation is likely to result." It appears that this statement should be considered in light of the qualifying provision of commercialization implicit in Canon 27. If no increase in litigation resulted, it would seem to be because the lawyers failed in their purpose to induce persons to resist alleged violations of constitutional rights; but surely the test of unprofessional conduct does not turn on whether the activity succeeded or failed in its purpose.

The significant point must have been that the motive of the action was not financial gain to the lawyers nor commercialization of the profession in general. This interpretation of the opinion is borne out by the following comment:

"[In situations in which offers of free legal services were condemned] . . . there was generally a strong suspicion that the gratuitous offer was motivated by the prospect of [later] obtaining remunerative employment. Of an entirely different nature is the gratuitous offer of legal services in a *cause celebre,* where the only possibility of pecuniary motive is that of enlarged practice consequent upon enhanced reputation. Even less offensive to the canons against advertising and solicitation, though not expressly exempted from their operation, is the solicitation by an individual or organization engaging solely in gratuitous practice, since the evils occasioning the rule would seem to arise only from solicitation motivated by commercial gain . . . Such solicitation [motivated only by the desire to serve the client's interest] may increase the burden upon the courts, but this seems warranted in the interests of justice, as this is not the type of stirring up of litigation to which the Canons of Professional Ethics refer." Note, 36 Colum. L. Rev. 993-994 (1936).

Opinion 148 concludes, however, with an apparent shift in emphasis, the final paragraph containing language which seems to indicate that when issues of sufficient political, social and economic significance are involved in the matters which are to be brought before the courts, the usual standards of conduct may not control:

"The question presented, with its implications, involves problems of political, social and economic character that have long since assumed the proportions of national issues, on one side or the other which multitudes of patriotic citizens have aligned themselves. These issues transcend the range of professional ethics."

The history of Canon 27 relative to free legal service to indigent persons is manifest in American Bar Association Opinions 191, 205, and 227. Opinion 191 was rendered to resolve a situation in which a group of lawyers had a plan to solicit employment from indigent persons at reduced rates according to the individual's ability to pay. The names of the participating lawyers were listed and notice of the plan was to be published in local newspapers, through charitable and welfare organizations, and through mailing directly to certain persons suggested by these organizations. In concluding that the plan violated professional ethics, the Committee stated: "The vice in the proposed plan is solicitation through advertisement of professional employment in behalf of specifically named lawyers." Op. 191.

Subsequently, other plans for providing legal services free or for nominal fees have been submitted to the American Bar Association for comment and have been upheld by the Committee on Professional Ethics and Grievances. They differ from the plan considered in Opinion 191 in that they were under the auspices of bar associations, and although they involved advertising or solicitation, the individual participating lawyers were not mentioned. In summary, it appears that legal aid plans which are sponsored by bar associations will be held in compliance with Canon 27 so long as the advertising is merely of an informative nature, apprising the intended persons in low income brackets of the plan and the procedures to be used in its administration. Pertinent to this point, the Joint Conference on Professional Responsibility has recently asserted:

"If there is any fundamental proposition of government on which all would agree, it is that one of the highest goals of society must be to achieve and maintain equality before the law. Yet this ideal remains an empty form of words unless the legal profession is ready to provide adequate legal representation for those unable to pay the usual fees." *Association of American Law Schools: Program and Reports of Committees* 120 (1958).

B. Financial Arrangements Between Attorney and Client

Three other canons, all dealing with financial arrangements between the attorney and his client, may have some relevance to race relations litigation.

1. Canon 10: Purchasing Interest in Litigation

Canon 10 contains the flat admonition that "the lawyer should not purchase any interest in the subject matter of the litigation which he is conducting." According to Radin, *supra,* The American Bar Association Committee, in adopting this canon, had in mind the statute of Henry VIII, 32 Henry VIII, ch 9; 4 Halsbury's Stat.

of England 301 (1929), against the purchase of pretended or doubtful titles. Drinker bases the prohibition upon the desire to curb the financial speculation of an attorney upon litigation which he is conducting. Drinker, *Legal Ethics* 99 (1953). Certainly the fundamental proposition here is that the administration of justice is endangered by any factor which would motivate counsel, for his own self-interest, to conduct litigation in any manner other than one dedicated to the just termination of the controversy. To that end, Canon 10 is designed to prevent an attorney from speculating in lawsuits by purchasing doubtful claims from members of the public and attempting to make a profit by prosecuting the claims to a successful conclusion, either by obtaining a settlement or a judgment. It has been held that Canon 10 does not apply to a case in which the attorney buys a cause of action as an investment, not depending upon his own professional capabilities to capitalize on it. This practice is sanctioned because, even though the realization on the investment may involve litigation, such litigation is "merely a possible incident to the purchase and is not its primary reason." Michigan Bar Ass'n Op. 65. Further, an attorney, in order to secure his fees, may properly take title to property which is presently the subject of litigation, provided this title is taken subject to the final determination by the court as to the rights of the adverse party. A.B.A. Op. 29.

2. Canon 13: Contingent Fee Contracts

It is quite commonly assumed that contingent fee contracts violate the spirit of Canon 10, inasmuch as such arrangements tend to tempt the attorney to win his case by any available means in order to collect a fee. However, Canon 13 specifically refutes the notion that contingent fee contracts are improper *per se:*

> "A contract for a contingent fee where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.

Admittedly, there is some difficulty in reconciling Canons 10 and 13. See Radin, *supra* at 75. It seems to be conceded that those dangers which Canon 10 seeks to avoid are promoted by Canon 13. The only rational basis of distinction seems to be that, despite the danger of abuses, it is in the best interest of the public to permit contingent fee contracts in order to provide impoverished persons with legal services needed to enable them to assert their legal remedies in the courts.

> "The contingent fee certainly increases the possibility that vexatious and unfounded suits will be brought. On the other hand, it makes possible the enforcement of legitimate claims which otherwise would be abandoned because of the poverty of the claimants. Of these two possibilities, the social advantage seems clearly on the side of the contingent fee." Radin, *Contingent Fees in California,* 28 Calif. L. Rev. 587, 589 (1940).

3. Canon 42: Expenses of Litigation

The express language of Canon 42 places the financial burden of litigation squarely on the shoulders of the client and explicitly forbids the attorney from assuming any portion of it: "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expense of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

In *State v. Rein,* 141 Neb. 758, 4 N.W.2d 829 (1942) the court held a contract between an attorney and his client to be clearly in violation of this canon in that it provided: "In the event the said (client) recovers nothing in said compensation action . . . he shall owe the said (attorney) nothing for his services and disbursements, pursuant to this agreement." at 832. See *Low v. Hutchinson,* 37 Maine 196 (1853); *Roller v. Murray,* 107 Va. 527, 59 S.E. 421 (1907). However, this is not to say that the attorney absolutely may not pay the expenses, for he may do so if he relinquishes his fee in advance and takes the case on a strict charity basis. N.Y. County. Op. 249.

That the purpose of the prohibition of Canon 42 is to prevent champertous agreements is indicated by the cautionary note added by the New York County Lawyers' Association Committee in Opinion 249, *supra:* ". . . the charity should not be induced by, or mingled with, the selfish interests of the lawyer." And the same basis for the restriction is recognized in the case of *In Re Gilman's Administratrix,* 251 N.Y. 265, 167 N.E.

437, 439 (1929), in which a New York statute was construed:

> "Champertous we think it [the attorney-client contract] was. The attorney bound himself by the agreement to pay the expenses of proceedings to enforce his client's rights . . . . The law does not say that an attorney is guilty of misconduct by the voluntary advance of the expenses of a lawsuit to a client too poor to pay the cost of justice. It does say that there is misconduct if he makes or promises the payment to discharge an obligation assumed in return for his retainer."

C. Conduct in Advancing the Client's Interests

1. Canons 15, 16 and 32: Lawyer's Duty to His Client

Several canons, most notably No. 15, enjoin the attorney to exercise his best skills, abilities and energies in advancing the legitimate interests of his client. However, the "entire devotion" and "warm zeal" owing from the lawyer to his client under the terms of Canon 15 do not constitute an absolute obligation; rather, it is tempered by Canons 16 and 32 in particular, as well as by the qualifying clauses of Canon 15, itself. The latter caution the attorney that it is *not* his duty "to do whatever may enable him to succeed in winning his client's cause," and that "the great trust of the lawyer is to be performed within and not without the bounds of the law."

Canon 16 particularizes in the following terms:

> "A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation."

In addition to this duty of the lawyer to attempt to restrain clients from improprieties, Canon 32 declares that no lawyer should "render any service or advice involving disloyalty to the law, whose ministers we are, or disrespect for the judicial office, which we are bound to uphold . . . ."

2. Advice to Violate the Law

That the "law" in this sense includes court orders as well as statutes is precisely demonstrated in New York County Lawyers' Association Opinion 262. There the Committee on Professional Ethics considered the question of professional misconduct involved in an attorney's public advocacy that a law, declared constitutional by the United States Supreme Court, be violated on the ground that it constituted an unwarranted invasion of personal liberty and was impossible of enforcement. The Committee held that for an attorney "publicly to advocate the violation of a law judicially declared to be constitutional . . . tends to lessen the respect of the public for law and is in violation of his duty as a lawyer." In New York County Lawyers' Association Opinion 331 the Committee indicated its disapproval of professional advice to violate a law, whether valid or not, in order to test its validity. (See also Opinion 27 of this Committee in which it was held to be improper for an attorney to advise a client to violate a penal statute and pay the prescribed fine rather than to obey the statute's direction.)

An attorney's advice to his client to disregard a court injunction prompted the following statement from the court in *Odell v. Baush & Lamb Optical Co.*, 91 F.2d 359 (7th Cir. 1937):

> "His own personal conviction of the unenforceability of the contract involved is no defense for his flouting the order of the court while that question was being determined." At 362.

It has also been held improper for an attorney to advance the interest of a client, a corporation, known to the attorney to be violating the law. American Bar Association Opinion 281 presents a situation in which the attorney was employed to advise how to break the law with the least chance of being convicted and to defend when charges were brought for these crimes. The Committee condemned the attorney's conduct as a flagrant violation of Canon 32.

3. Criticism of the Courts

It is pertinent to note here that the opening sentence of the first of the American Bar Association canons lays a significant restraint on any attorney who may be moved to attack a court because of decisions adverse to a client's interests:

"It is the duty of the lawyer to maintain toward the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance."

The duty of the members of the bar in this regard was succinctly expressed by Charles S. Rhyne, speaking as the President of the American Bar Association in 1957:

". . . It is not at all disturbing that large numbers of intelligent persons should disagree with the legal reasoning of the Court, the authorities cited, or lack of them, or the ultimate decision. But is is extremely serious that personal insults are now hurled *at members of the Court* in place of criticism directed *at their decision*. One may disagree with an opponent, and yet respect him and his motives. Disagreement is a sure sign of intellectual activity—the freedom of thought which is essential to democracy. But when that disagreement runs rampant in the form of malicious charges directed toward undermining and smearing the opponent, this is cause for freedom loving men to become alarmed. For this type of attack cares little for the virtue of truth.

". . .

"This must be the position of our legal profession. We must lead in upholding the dignity and respect of our judicial system. Fight the decisions if you will. Endeavor to have them overruled. But do not disparage the status of the Courts as an institution of government by blanket attacks upon the courts, or even a particular court." Address before the State Bar of New Mexico, Roswell Courtroom, September 20, 1957.

D. Activities by Corporations and Associations

Two interrelated canons have a direct bearing on the problems of professional ethics created by activities of corporations or unincorporated associations in connection with the practice of law. Canon 47 provides:

"No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."

Canon 35, emphasizing the need for a direct and personal relationship between attorney and client, opens with the following injunction:

"The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer . . . . Charitable societies rendering aid to the indigents are not deemed such intermediaries."

1. Canon 47: Unauthorized Practice of Law

Problems concerning unauthorized practice commonly involve two distinguishable questions: (1) Does the activity in question constitute the practice of law? (2) If so, is the party in question entitled to practice law? The Canons of Professional Ethics do not, of course, provide the answer to either question, but rather, deal with the lawyer's relation to the questioned activity and party.

Though Canon 47 warns the attorney against becoming a tool by which the illegal activity is carried on, the matter of determining what constitutes unauthorized practice is recognized to be for the legislatures and the courts, rather than for bar associations and their ethics committees. A.B.A. Op. 198. The legislatures of a number of states have enacted statutes defining and forbidding unauthorized practice [*e.g.*, N.C. Gen. Stat. §§ 84-4, 84-5 (1953); Tenn. Code Ann. §§ 29-302, 29-303 (1955)], but the courts have asserted their own inherent right to control the practice of law in this respect, even in the absence of statute. *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, 55 R.I. 122, 179 Atl. 139 (1935); *People v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901 (1931).

Thus, from both statutes and case opinions come the criteria for determining what constitutes the practice of law. Obviously, appearance in a court proceeding on behalf of a client falls within the scope of the concept. However, it also includes the giving of legal advice and counsel without such an appearance.

"As the term is generally understood, the 'practice' of the law is the doing or performing services in a court of justice, in any manner depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger

> sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court." *Eley v. Miller*, 7 Ind. App. 529, 34 N.E. 836, 837 (1893).

That the giving of advice concerning what course to pursue in legal matters will be held to render a layman, individual or corporate, subject to punishment for unauthorized practice is substantiated in *People v. People's Stock Yards State Bank, supra:*

> "The practice of law also includes the giving of advice or rendering services requiring the use of legal skill or knowledge . . . . Practicing as an attorney or counselor at law, according to the laws and customs of our court, is the giving of advice or rendition of any sort of service by any person, firm or corporation where the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill." at 907.

For a more specific application of the rule, see *Hulse v. Criger*, 363 Mo. 26, 247 S.W.2d 855 (1952).

To the question of who is entitled to practice law, more concise and positive answers can be given. The classic statement was made in *In Re Co-Operative Law Co.*, 198 N.Y. 479, 92 N.E. 15 (1910):

> "No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the court. As the conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate." at 16.

An even more emphatic prohibition against the practice of law by corporations or associations is found in a Massachusetts statute, which generally reflects the rule followed in all states.

> "No corporation or association shall practice or appear as an attorney for any person other than itself in any court in the commonwealth or before any judicial body or hold itself out to the public or advertise as being entitled to practice law, and no corporation or association shall draw agreements, or other legal documents not relating to its lawful business, or draw wills, or give legal advice in matters not relating to its lawful business, or practice law, or hold itself out in any manner as being entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular; provided, that nothing herein shall prohibit a corporation or association from employing an attorney in regard to its own affairs or in any litigation to which it is or may be a party or the insurer of a party." Mass. Ann. Laws, c. 221, § 46 (1955). See also Ill. Ann. Stat. c. 32, § 411-415 (1954).

Canon 47 and Canon 35 (by another approach) serve to help implement this proscription against corporate practice of law by prohibiting the individual attorney from enabling the organization to practice law indirectly. Exemplifying the type of conduct referred to by Canon 47 is that of the offending attorney in *In Re Otterness*, 181 Minn. 254, 232 N.W. 318 (1930). He was employed by a bank as vice president on a fixed annual salary. By the agreement, defendant was also to continue to practice law, not alone as counsel for the bank but for others as well. All fees earned by him in the latter practice were to go to and be paid over to the bank and become income of the bank. The court said:

> "[N]either a corporation nor a layman, not admitted to practice, can practice law, nor indirectly practice law by hiring a licensed attorney to practice law for others for the benefit or profit of such hirer. For this bank to employ defendant to conduct law business generally for others, for the benefit and profit of the bank, amounted to the unlawful practice of law by the bank, and was misconduct both on the part of the bank and this defendant, who was a participant therein." At 319. See also *In re Pace*, 170 App. Div. 818, 156 N.Y. Supp. 641 (1915).

2. CANON 35: INTERMEDIARIES BETWEEN ATTORNEY AND CLIENT

Though the principle of Canon 35 applies in other situations, it operates most significantly in regard to corporation and association activities related to the practice of law. This close connection is demonstrated in *People v. Merchants' Protective Corp.*, 189 Cal. 531, 209 Pac. 363 (1922), involving a corporation organized for the avowed purpose of furnishing its members legal services in their business, personal or private matters. The court explained at some length the basis of the objection to the intervention of an intermediary between an attorney and his client.

> "The essential element underlying the relation of attorney and client is that of trust and confidence of the highest degree growing out of the employment and entering into the performance of every duty which the attorney owes to his client in the course of such employment. It is the existence of this essential element as the basis of said relation which has called into being the various statutory regulations governing the admission of attorneys and counselors at law and which embody certain requirements of character, integrity, and learning as the prerequisites of such admission to the right and privilege of practicing law. It is the possession or reputation for the possession of these personal qualifications which constitute, as a rule, the main inducement for the formation of the personal and confidential relation of attorney and client. The intervention of a corporation between the members it secures and the attorneys it employs, which corporation can in and of itself possess none of these qualifications, obviously leaves out of view the necessity for their existence. The essential relation of trust and confidence between attorney and client cannot be said to arise when the attorney is employed, not by the client, but by some corporation which has undertaken to furnish its members with legal advice, counsel, and professional services. The attorney in such a case owes his first allegiance to his immediate employer, the corporation, and owes, at most, but an incidental, secondary and divided loyalty to the clientele of the corporation." At 366.

Two other elements of unprofessional conduct frequently enter into the intermediary situations. First, the attorney who participates in such an arrangement is often promoting the unauthorized practice of law by the intervening agency, as is pointed out in American Bar Association Opinion 122:

> "There never could have arisen in this country any widespread lay practice of the law without the assistance (and we may say the suggestion and inventive genius) of intelligent but highly unprofessional lawyers. It may fairly be said now that no lawyer can urge unfamiliarity with either the ethical or legal improprieties of such misconduct. It must cease or be stopped by the activities of the organized profession. Drastic action should hereafter be taken against any lawyer participating therein."

Second, such arrangements quite readily lead to violations of the rule against advertisement and solicitation of professional employment, inasmuch as the lay intermediary is free to advertise and solicit business. *In re Tuthill*, 10 N.Y.S.2d 643 (1939) dealt with the actions of an attorney representing clients obtained by the attorney's employer-corporation which had notified them of their valid claims to intestate estates. The court there observed:

> "The record leaves no doubt that respondent was aware of the fact that the corporation obtained its business through solicitation. As an attorney, respondent could not himself so solicit. In accepting engagements from the corporation, respondent was doing indirectly what he could not ethically do directly." at 649.

The language of American Bar Association Opinion 31 denotes the concern for this aspect of the situation:

> "[T]he solicitation of 'law practice' is contrary to *Canon 27*, not only when it is done by the lawyer but also when he acquiesces in the use of his name in connection with such solicitation by others."

Numerous arrangements violating the principles of Canon 35 have been exposed by bar association committee opinions and court decisions. One of the earliest of these is American Bar Association Opinion 8. There attorneys who were engaged in general practice were employed by an automobile club to provide legal advice

for members of the club. They were paid fixed monthly salaries by the organization, and devoted only such time to it and its members as was made necessary by whatever matters might arise. The American Bar Association Committee strongly expressed its disapproval of the conduct of the attorneys in participating in this arrangement.

> "... Society has seen fit, for its own benefit and protection, to limit the practice of law to those individuals whom it has found duly qualified in education and character. The permissive right conferred on the lawyer is an individual and limited privilege subject to withdrawal if he fails to maintain proper standards of moral and professional conduct. Neither this privilege, nor any responsibility or duty connected therewith, can be delegated to or shared with a layman. As the lawyer cannot share his professional responsibility with a layman or lay agency, he cannot properly share his professional emoluments with them. This of itself is sufficient to render it improper for a lawyer to allow his services to be sold or dealt in by any layman or lay agency. But there is yet another reason why such a practice is abhorrent. The essential dignity of the profession forbids a lawyer to solicit business or exploit his professional services. It follows that he cannot properly enter into any relations with another to have done for him that which he cannot properly do for himself.
>
> "It must therefore be held that the furnishing, selling or exploiting of the legal services of members of the Bar is derogatory to the dignity and self-respect of the profession, tends to lower the standards of professional character and conduct and thus lessens the usefulness of the profession to the public, and that a lawyer is guilty of misconduct, when he makes it possible, by thus allowing his services to be exploited or dealt in, for others to commercialize the profession and bring it into disrepute." Op. 8.

Again, in Opinion 56 the American Bar Association Committee disapproved a grange association's employment of attorneys to handle probate matters for members of the organization at a flat fee. The opinion states that the impropriety of such conduct would not be varied by the amount of the fees or the manner in which they are paid. While, of course, an attorney can properly enter into a contract to furnish legal services to an organization, he "cannot properly accept employment from a lay intermediary to do legal work for its patrons or members." Op. 56. (See Canon 35, paragraph 2). The same principle has been applied in cases involving corporations, labor unions, employer organizations and trade associations. Drinker has summarized the applicable rules as follows:

> "The Canon does not preclude counsel for a corporation or association from representing its individual employees, patrons, stockholders or members or groups of them provided such employment has not been the result of improper solicitation, and provided such relation is personal and direct and the service paid for by the individual client or pro-rated among the group, and not paid by the corporation or association.
>
> "Where, however, the corporation or association employs and pays the lawyer to advise and represent its employees, patrons, or members in respect to their individual affairs, the prohibition of the Canon is directly applicable, even though the lawyer's relation is direct, although there is no conflict of interest between the client and the organization, and even though the reason and occasion for the service is the bona fide interest of the organization to see that it is performed. . . . [F]or a corporation to provide a lawyer to advise and serve its employees constitutes the unathorized practice of law by it." Drinker, *supra*, 162.

The usual strict application of Canon 35 has been somewhat qualified in American Bar Association Opinion 168. There a law firm, general counsel for a manufacturers' association, was concerned with the propriety of legal opinions rendered in behalf of all the members of the association.

> "It is our view that such opinions, where they are applicable to problems common to all members of the association, are not only proper, but that they serve a highly useful purpose. In these days of constantly increasing restrictions imposed by both state and federal government on the hitherto comparatively unlimited exercise of business enterprise, it is absolutely essential for a law-abiding merchant or manufacturer to be

in receipt of ready and continuous advice in order that he may properly conduct his affairs . . . . The giving of advice upon subjects affecting the group is a proper function of a lawyer, protecting its members from prosecution, penalty and loss and at the same time interpreting the law and encouraging its due observance." Op. 168.

This opinion is further elaborated on in American Bar Association Opinion 273 which dealt with virtually the same fact situation.

"Each case must depend on its own facts, the question under *Canon* 35 being always whether, under all the circumstances, the lawyer may reasonably believe that he is rendering an opinion of general interest to the entire membership . . . or whether he is in reality giving advice to one or a group of individual members on their individual problems, through the association under the guise of giving advice to it."

That the New York City and County Bar Associations are prepared to go further in allowing corporation attorneys leeway may be indicated by certain of the opinions of their ethics committees. New York City Opinion 176 presents the situation of an attorney of a seamen's union interviewing a member of the union who was injured in the line of duty. The opinion states:

"[I]t would not seem to the Committee to be any breach of professional ethics for the attorney to answer the call of the agent for the association to interview the seaman, and if the attorney is satisfied that the latter has meritorious claim, to accept a retainer from the seaman to prosecute the same." Op. 176.

A further liberalization of Canon 35, which does not seem to be inherent in the opinions of the American Bar Association is presented in New York County Lawyers' Association Opinion 331. An attorney of an association whose members were manufacturers under the N.R.A. code regulation was asked to represent an individual member of the association who was being prosecuted for violation of the code. Referring to the propriety of the representation the committee stated:

"The inquiry appears to imply that the purpose in the given case is to test in the interest of all, a question of law and of right, which, in the nature of the situation, can best be presented through an individual member. If such be the fact, the Committee (but for Section 280 of the Penal Law) would not consider the acceptance of the specific employment professionally improper." Op. 331.

(Sec. 280 prohibits practice of law by a corporation, and the committee expressed no opinion on whether any violation of that statute was involved in the situation presented.)

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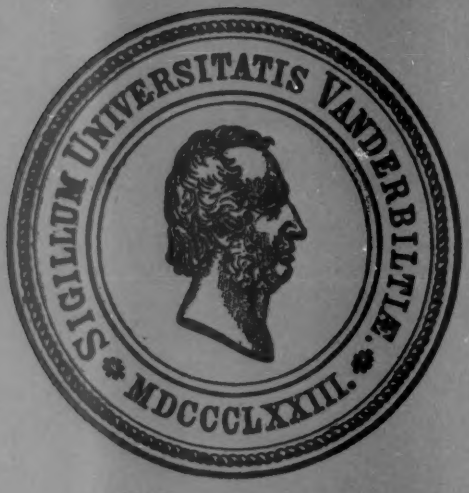
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